SUPREME COURT OF THE UNITED STATES.

No. 286.

SHEPHERD KNAPP, PLAINTIFF IN ERROR,

vs.

THE TROY AND BOSTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Vermont, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Shepherd Knapp, of the city of New York, plaintiff, and The Troy & Boston Railroad Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Shepherd Knapp, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under
2 your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday in December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the second day of April, one thousand eight hundred and seventy-two.

[SEAL.] B. B. SMALLEY,
Clerk U. S. Circuit Court, District of Vermont.

3 E. J. PHELPS,
Att'y for Pl'ff in Error.

UNITED STATES OF AMERICA,
District of Vermont, ss:

I, Bradley B. Smalley, clerk of the circuit court of the United States of America for the district of Vermont, in the second circuit, by virtue of the above writ of error, & in obedience thereto, do hereby certify that the following pages, numbered from 1 to 130, inclusive, contain a true & complete transcript of the record & proceedings had in said court in the case of Shepherd Knapp & George Briggs, plaintiffs in error, against The Troy & Boston Railroad Company, defendant in error, as the same remain of record & on file in said cause.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Burlington, in said Vermont district, in the second circuit, this 17th day of October, A. D. 1872, & of the Independence of the United States the ninety-seventh.

[SEAL.] B. B. SMALLEY, *Clerk.*

4 (Indorsed:) U. S. Supreme Court. Shepherd Knapp, pl'ff in error, v. The Troy & Boston Railroad Company, def't in error. Writ of error. Filed April 2d, 1872. B. B. Smalley, clerk. E. J. Phelps, att'y for pl'ff in error.

5 United States circuit court, district of Vermont.

SHEPHERD KNAPP
vs.
THE TROY & BOSTON RAILROAD COMPANY.

Be it remembered that, at a term of the circuit court of the second

circuit of the United States, begun and holden at Windsor, within and for the Vermont district, on the 28th day of July, A. D. 1868—

Present, the Hon. Samuel Nelson, United States Supreme Court judge within and for the second circuit, and Hon. David A. Smalley, United States district judge within and for the Vermont district—

Comes The Troy & Boston Railroad Company, of Troy, in the State of New York, by A. B. Gardner, esq'r., its attorney, and brings into court now here certified copies from the county court within and for the county of Bennington, in the State and district of Vermont, of the petition of said Troy and Boston Railroad Company to remove said cause to this court; which said petition was in the words and figures following:

6 To the hon. the county court to be holden at Bennington, within and for the county of Bennington, on the first Tuesday of December, A. D. 1867:

Your petitioners, The Troy & Boston Railroad Company, a corporation created and existing under the laws of the State of New York, and doing business in that State, respectfully represent that they are, and ever have been, citizens of the said State of New York; that, on the 16th day of January, A. D. 1867, a writ of attachment was prayed out by the Bennington and Rutland Railroad Company, a corporation created and existing under the laws of the State of Vermont, in the name of Shepherd Knapp and George Briggs, of the city of New York, against your petitioners, the said Troy and Boston Railroad Company, demanding therein, in damages, the sum of three hundred thousand dollars, and returnable to the county court holden at Manchester, within and for the county of Bennington, and State of Vermont, on the first Tuesday of June, A. D. 1867; and afterwards, on the same 16th day of January,

7 A. D. 1867, cause' the property then in the custody of, and used by, your petitioners to be attached thereon to the amount of more than one hundred thousand dollars, as by the said writ and the officer's return thereon, now on file in this court, will more fully and at large appear; that said suit was duly entered at the June term of this court, holden at Manchester, within and for the said county of Bennington, on the first Tuesday of June, A. D. 1867, and continued to the present term of this court.

And that said suit is now pending in this court; that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs, to wit, the sum of three hundred thousand dollars.

Your petitioners further state that Shepherd Knapp and George Briggs, in whose name said suit was brought, are mere nominal parties in said suit; that they have no interest in the subject-matter of said suit, or in the event thereof; that said suit has been commenced and is prosecuted at the expense of, and by the said Bennington and Rutland Railroad Company, and for the benefit of said Bennington

8 and Rutland Railroad Company, then and now a citizen of the State of Vermont; that the controversy in said suit is between the said Bennington and Rutland Railroad Company, and the said Troy and Boston Railroad Company, citizens of different States.

Your petitioners therefore pray that said cause may be removed to the circuit court of the United States, next to be holden within and for the district of Vermont, at Windsor, in the county of Windsor, on the 4th Tuesday of July, A. D. 1868, and for the further reasons stated in the affidavit hereto attached, and in pursuance of the statutes in such case made and provided.

TROY & BOSTON RAILROAD COMPANY,
By LYMAN WILDER, *Director.*

STATE OF VERMONT, *Bennington County, ss:*

At Bennington, this 9th day of December, A. D. 1867, personally appeared Lyman Wilder, of Hoosick, in the State of New York, and, being duly sworn, says that he is a director of the above-named Troy and Boston Railroad Company; that he has heard the foregoing petition read; that the same is true; that he signed the said petition on behalf of the said company, and was duly authorized by the said company so to sign the same.

Before me—

JA'S B. MEACHAM,
Notary Public.

I, Lyman Wilder, of Hoosick, in the county of Rensselaer, and State of New York, depose and say that I am on' of the directors of the Troy and Boston Railroad Company, a corporation created and existing under the laws of the State of New York; that, on the 16th day of January, A. D. 1867, a suit was commenced in the name of Shepherd Knapp and George Briggs, of the city of New York, in the State of New York, against the said Troy & Boston Railroad Company, demanding in damages the sum of three hundred thousand dollars, and in which the property used by said company was attached to a large amount.

I further say that said suit, commenced as aforesaid in the name of said Knapp and Briggs, was brought by and for the benefit of the Bennington & Rutland Railroad Company, a corporation organized under the laws of the State of Vermont, and a citizen thereof, and doing business therein, and that the controversy involved in said suit is between the said Bennington and Rutland Railroad Company, and the said Troy & Boston Railroad Company, citizens of different States.

I also say that said suit was returnable to and duly entered in this court at the June term thereof, 1867, and was continued to the present term of this court, holden at Bennington, within and for the county of Bennington, on the first Tuesday of December, A. D. 1867, and is now pending in this court; that the matter in dispute in said suit, exclusive of costs, exceeds the sum of five hundred dollars. I further say, for and in behalf of said Troy and Boston Railroad Company, that I have reason to and do believe that, from prejudice to the said defendants in said suit, and local influence in said county where said suit is pending as aforesaid, they, the said Troy and Boston Railroad Company, will not be able to obtain justice, or an impartial trial in said county court where the same is pending as aforesaid.

LYMAN WILDER.

STATE OF VERMONT, *Bennington County, ss:*

At Bennington, this 9th day of December, A. D. 1867, personally appeared Lyman Wilder, & made oath that the foregoing affidavit, by him subscribed, is true.

Before me—

JA'S B. MEACHAM,
Notary Public.

(Indorsed:) Knapp & Briggs vs. Troy & Boston R. R. Co. Ben. Co. court, Dec. T., 1867. Petition and affidavit of defendants

for removal to circuit court. Filed in court Dec. 10, 1867. John V. Hale, clerk.

C. A true copy of the original.

JOHN V. HALE, *Clerk.*

Filed July 28, 1868.

B. B. SMALLEY, *Clerk.*

[5-cent rev. stamp,.]

13 And at the same time filed the order of said Bennington County court to remove this cause to this court, which said order was in words and figures following:

Ben. Co. court, Dec. term, 1867.

KNAPP & BRIGGS
v.
THE TROY & B'N R. CO. } No. 145.

In this cause it is ordered that the same be sent for trial to an adjourned term of this court, appointed to be held at Bennington on the 28th day of April, 1868, at 10 a. m., and that the cause be there tried.

Dated in court at Bennington, this 13th February, 1868.

E. M. AYLESWORTH,
HIRAM COLE,
Judges of Ben. Co. Court.

A true copy of the original order.

JOHN V. HALL, *Clerk.*

At the original term of Bennington County court, held at Bennington, on the 28th day of April, 1868, it was ordered that the security offered be accepted, & that the cause be removed to the circuit court of the United States in & for the district of Vermont.

CHA'S W. SMITH, *Deputy Clerk.*

14 (Indorsed:) Knapp & Briggs v. The Troy & Boston R. Co. No. 145. Ben. Co. ct., Dec. T., 1867. Order. Filed July 28, 1868. B. B. Smalley, clerk.

15 And at the same time the said Troy and Boston Railroad Company filed a certified copy from said county court, of the original writ against said company, with the officer's return thereon, which said writ and officer's return were in the words and figures following:

STATE OF VERMONT,
Bennington County, ss:

To any sheriff or constable in the State, and for want of such officer, seasonably to be had, to Jasper Viall, an indifferent person, greeting:

By the authority of the State of Vermont you are hereby commanded to attach the goods, chattels, or estate of the Troy & Boston Railroad Company, a corporation established by the laws of the State of New York, of Bennington, in said county, to the value of three hundred thousand dollars, and them notify thereof according to law; and, also, notify them to appear before the county court next to be holden

at Manchester, within and for said county of Bennington, on the first Tuesday of June next, then and there, in said court, to answer unto
Shepherd Knapp and George Briggs, both of the city, county,
16 and State of New York, who were at the time of the several
promises and covenants hereinafter stated, and ever since have been, and still are, trustees of the first mortgage on the Western Vermont Railroad, duly appointed, in a plea of breach of covenant.

For that whereas the said Shepherd Knapp and George Briggs, before and at the time of the making of the indenture hereinafter mentioned, were, as trustees as aforesaid, lawfully seized of the said Western Vermont Railroad, and of the buildings, privileges, and appurtenances thereto belonging, and, as such trustees, had good right to lease the same; and, being so seized, heretofore, to wit, on the 16th day January, 1857, at Bennington aforesaid, by a certain indenture then and there made between the plaintiffs, as such trustees, on the one part, and the defendants on the other part, the counterpart of which said indenture, sealed with the corporate seal of the defendants and duly witnessed and acknowledged, the plaintiffs now bring here into court; the date thereof is the day and year last aforesaid, the plaintiffs, as trustees as aforesaid, did lease and demise to the defendants for the
period of ten years from and including said date, subject to the
17 conditions in said indenture expressed, the said Western Vermont Railroad as located and theretofore occupied under the charter of the Western Vermont Railroad Company, with all the buildings, privileges, and appurtenances thereto belonging, and the full right to hold, use, and operate the same in conformity with said charter; together with all the tools, implements, and furniture belonging to the plaintiffs as such trustees, and thereon or about said road, and used for operating or repairing the same; yielding and paying therefor to the plaintiffs, as such trustees, as rent for said road and property, the sum of twenty-five hundred dollars per month for the first year of said lease, and the sum of three thousand dollars per month during all the succeeding years thereof; and the defendants did, then and there, in and by said indenture, covenant and agree with the plaintiffs, as trustees as aforesaid, (among other things,) to return said road and property, both real and personal, at the termination of said lease, in as good condition and repair, in all respects, as the same were then in, natural wear only excepted, as by the said indenture, reference thereto being
had will (amongst other things) more fully and at large appear.
18 And it was, in and by said indenture, (amongst other things,)
further mutually covenanted and agreed between the plaintiffs, as such trustees, and the defendants, that Charles Linsley, then of Rutland, Vermont, and either one of the then present railroad commissioners of the State of New York, provided his attendance should upon reasonable application be procured by the defendant, should pass over and examine said road & property as soon after the date of said indenture as the state of the weather and the season should render it practicable, and should make an examination as to the condition and state of repairs of the same; and that, upon the termination of said lease from any cause, the same parties or the survivor of them, if either of them should be living, and should be where his attendance could be obtained, should make a like examination for the purpose of determining whether the said road and property were in the condition and state of repair required by said indenture, and if not to appraise the difference in value, the decision so made to be final between the plaintiffs, as such trustees, and the defendants. Whereupon and by virtue of said

19 indenture the said defendants then and there entered upon the said demised railroad, with the buildings, privileges, and appurtenances, and property, and become thereof possessed, and continued so thereof possessed from thence until the 16th day of January, A. D. 1867, when the said lease and demise ended and determined, to wit, at Bennington aforesaid; and, although the plaintiffs, as trustees as aforesaid, have always from the time of making of said indenture hitherto, well and truly kept and performed, on their part, all things therein contained by them to be kept and performed, according to the true tenor and effect of said indenture, to wit, at Bennington aforesaid, yet protesting that the defendants, since the making of said indenture, have not performed, fulfilled, or kept any thing in said indenture contained on their part to be kept, performed, and fulfilled according to the true tenor and effect of said indenture. The plaintiffs in fact say that the defendants did not at the termination of said lease, to wit, on the 16th day of January, 1867, return said railroad and property to the plaintiffs, as trustees as aforesaid, in as good condition and repair in all
20 respects, nor in any respect, as the same were in at the time of the making of said indenture, natural wear only excepted, nor did nor would they return any part thereof in as good condition and repair, according to the true intent and meaning of said indenture; but, on the contrary thereof, the defendants, during the continuance of said lease, and while they were so possessed of said road with the appurtenances, to wit, on the first day of January, 1860, and furthermore for a long space of time, to wit, from thence until the termination of said lease, suffered and permitted the said railroad and its buildings, appurtenances, and superstructure, from time to time, to become and remain greatly—ruinously out of repair in all respects, and to fall into a condition & state of repair far worse than the same were in at the time of making said indenture, beyond and besides the natural wear thereof, according to the true intent and meaning of said indenture, and so to continue and remain up to and at the time of the termination of said lease, and up to and at the time of the return of said road to the plaintiffs, as such trustees, after said termination as hereinafter mentioned, and especially in this, that the defendants did suffer and allow, during the period last aforesaid, the iron rails on said road, and
21 along the whole length thereof, to become worn and broken, destroyed, and worthless, and did, likewise, during the period aforesaid, suffer and permit the wooden ties, used in the superstructure of said road, to become and remain decayed, broken, worn-out, and useless along the whole line and length of railroad.

And did likewise suffer and permit, during the period aforesaid the road-bed of railroad to become and remain rough, uneven, and greatly out of repair, and without ballasting the same; and did also suffer and permit the planks at the crossing of highways and other ways, over and upon said road during all the period aforesaid, to become and remain broken, split, and worn out; and did also suffer and permit during all the period aforesaid the turn-tables belonging to said road, and a part of the same, and necessary to its use, to be greatly injured broken and worthless, and to remain so up to the termination of said lease.

And the defendants, during all the period aforesaid, did suffer and permit the cattle-*gaurds*, cattle-passes, bridges, and culverts to become and remain decayed, worn out, and broken, said cattle-*gaurds*
22 cattle-passes, bridges, and culverts then and there belonging to and a part of said road; and did also suffer and permit the piles and frame work which support the track of said road over the stream and

pond in the village of Bennington, said piles and frame work belonging to and being a part of said road, to become and remain broken, split, decayed, and dangerous.

And the said defendants did also suffer and permit the various water-tanks along the line of railroad, and forming a part thereof, and belonging thereto, to wit: One of said tanks at Bennington, one at North Bennington, one at Shaftsbury, one at Arlington, one at Manchester, one at Dorset, all in said county of Bennington; and one at Danby, one at Wallingford, and one at Rutland, all in the county of Rutland, to become during the period aforesaid, and to remain damaged, broken, and out of repair; and the station-houses, engines, and car-houses, machine-shops, and wood-sheds and other buildings along the line of said road, and belonging thereto, and forming a part thereof, to become and remain injured, dilapidated, and out of repair.

23 And the defendants did also, during the period aforesaid, suffer and permit the fences along the whole line of said road on both sides of the same and belonging thereto, and forming a part thereof during the period aforesaid, to become decayed, broken, fallen down, and worthless; and did also, during the period aforesaid, suffer and permit the ditches along the whole line of railroad on both sides thereof, belonging to and forming a part thereof, to be and become filled up with earth and stones, and greatly out of repair, whereby the water soaked into and greatly injured the road-bed of said road, along the whole length thereof. And the said defendants did also, during the period aforesaid, suffer and permit the earth and stones to slide, roll, and fall down the banks on both sides of said road, where the same passed through cuts in and upon and near unto the iron rails on said road, so that said cuts become and are greatly narrowed, inconvenient, and dangerous; and did also, during the period aforesaid, suffer and permit the earth and stones to slide, roll, and fall away and down from railroad, on each side thereof, where there are fills or embankments over and

24 upon which the track of said road is laid, so that at all such fills or embankments the surface of said road-bed along the whole line of the same became and remained narrow, inconvenient, and dangerous.

And the defendants did, likewise, during the period aforesaid, suffer and permit one of the station-houses aforesaid, situated in Wallingford aforesaid, on the line of railroad and belonging thereto and necessary to its use, and being of great value, to wit, the value of one thousand dollars, and which at the time of the making of said indenture was in good condition and repair, to become and remain up to and at the termination of said lease, burned down and wholly destroyed.

And the plaintiffs aver that the defendants left said road, buildings, and appurtenances, and returned the same to the possession of the plaintiffs at the termination of said lease, to wit, on the 15 day of January, 1867, at Bennington aforesaid, in the condition and state of repair last aforesaid, and especially in respect to the said rails, ties, cross-

25 ings, cattle-*gaurds*, cattle-passes, bridges, culverts, and turn-tables, road-bed, water tanks, station-houses, engine and car houses, machine-shops, wood-sheds, and buildings, fences, ditches, cuts, and embankments, belonging to and forming a part of said road and appurtenances, and that in all the respects and particulars aforesaid, and in many others, said road, buildings, and appurtenances, and said rails, ties, road-bed, crossings, cattle *gaurds* and passes, bridges, culverts, turn-tables, water-tanks, station-houses, engine and car houses, machine-shops, wood-sheds, and other buildings, fences, ditches, cuts, and embankments thereto belonging, and then and there at the time of said re

turn, in a far worse condition and state of repair than the same were in at the time of the making of said indenture, beyond and besides the natural wear thereof, according to the true intent and meaning of said indenture, and all from want of the seasonable and ordinary, and necessary repairs that should have , from time to time, performed and bestowed thereon by the defendants during the continuance of said lease in the reasonable use and operation of said road, and according to such true intent and meaning, whereby the value of said road, buildings,
26 and appurtenances has been greatly diminished, to wit, to the amount of two hundred thousand dollars.

And large and immediate repairs of the same have become and are necessary and must be incurred by the plaintiffs, as trustees as aforesaid, to wit, to the amount of two hundred thousand dollars.

And the plaintiffs aver that, though reasonable application was made by them to the defendants, and within a reasonable time after the making of said indenture, to wit, on the first day of April, 1857, at Bennington aforesaid, and the defendants were then and there by the plaintiffs requested to procure the attendance of some one of the then railroad commissioners of the State of New York, for the purpose of passing over said road with the said Charles Linsley and examining the same as to its condition and state of repair, as provided in said indenture, and the plaintiffs were then and there ready and willing, and offered to said defendants to procure the attendance of said Linsley for that purpose, yet the said defendant did not nor would upon such reasonable
27 application, nor at any time, procure the attendance of either one of said railroad commissioners for that purpose, and no such examination of said road and property was ever made under said agreement in said indenture, either by said Linsley or either of said commissioners, and said Linsley afterwards and before the termination of said lease, to wit, on the first day of November, 1862, deceased.

And so the plaintiffs, in fact, say that the defendants, though often requested so to do, have not kept the said covenant so by them made as aforesaid, in manner and form as aforesaid, but have broken the same.

And also for that, whereas, heretofore, to wit, on the 16th day of January, 1857, at Bennington aforesaid, by a certain other indenture, then and there made between the plaintiffs, as such trustees, on the one part, and the defendants on the other, the counterpart of which said indenture, sealed with the corporate seal of the defendants, and duly witnessed and acknowledged, the plaintiffs now bring here into court, the date whereof is the day and year last aforesaid, the plaintiffs as trustees as aforesaid, did lease and demise to the defendants for the period of ten years, from and including said date, subject to the condi-
28 tions in said indenture expressed, a certain other railroad known as the Western Vermont Railroad, as located theretofore, occupied under the charter of the Western Vermont Railroad Company, with all the buildings, privileges and appurtenances thereto belonging, and the sole right to hold, use, and operate the same in conformity with said charter, together with all the tools, implements, and furniture belonging to the plaintiffs as such trustees, and thereon or about said last-mentioned road, and used for operating or repairing the same; yielding and paying therefor to the plaintiffs, as such trustees, as rent for said road and property last mentioned, the sum of twenty-five hundred dollars per month for the first year of said last-mentioned lease, and the sum of three thousand dollars per month for and during all the succeeding years thereof.

And the said defendants did, then and there, in and by said last-mentioned indenture, covenant and agree with the plaintiffs, as trustees as aforesaid, amongst other things to return said last-mentioned
29 road and property, both real and personal, at the termination of the said last-mentioned lease in as good condition and repair in all respects, as the same were then in, natural wear only excepted, *and* by the said last-mentioned indenture reference thereto being had, will more fully and at large appear.

And it was by said last-mentioned indenture, among other things, further mutually agreed and covenanted between the plaintiffs, as such trustees, and the defendants, that Charles Linsley, then of Rutland, Vermont, and with one of the then present railroad commissioners of the State of New York, provided his attendance should, upon seasonable application, be procured by the defendants, should pass over and examine said last-mentioned railroad and property as soon after the date of the said last-mentioned indenture as the state of the weather and the season should make it practicable; and should make an examination as to the condition and state of repairs of the same. And that, upon the termination of said last-mentioned lease from any cause, the same parties or the survivor of them, if either of them should be living, and should be where his attendance could be obtained, should make a like examination for the purpose of determining whether the said last-
30 mentioned road and property, were in the condition and state of repair required by said last-mentioned indenture, and if not, to appraise the difference in value, the decision so made to be final between the plaintiffs, as such trustees, and the defendants.

And in and by said indenture it was, then and there, by the said parties thereto, further mutually covenanted and agreed that the said lease was made subject *and* to this *and* condition: That if a majority in amount of the bond-holders under said first mortgage on said road, should, within ninety days from the date of said indenture, unite in giving a notice in writing, of the desire of said majority of bond-holders to terminate said lease at the expiration of one year from the date of said indenture, then the said lease should be terminated and should stand valid between the parties only as a lease for one year from said date, subject, however, to the other provisions of said indenture.

Whereupon and by virtue of said last-mentioned indenture, the defendants then and there entered upon the said demised railroad last-mentioned with the buildings, privileges, and appurtenances and
31 property, and became thereof possessed, and continued so thereof possessed from thence until the 16th day of January, 1867, when the said lease and demise terminated, to wit, at Bennington aforesaid.

And the plaintiffs aver that no notice was ever given by a majority in amount of said bond-holders to the defendants, either within ninety days from the date of said indenture, or at any other time of the desire of said majority to terminate said lease at the expiration of one year from said date in accordance with the provisions to that effect in said indenture cont*inue*d as aforesaid, and said lease was not so terminated.

And although the plaintiffs, as trustees as aforesaid, have always, from the time of making said last-mentioned indenture hitherto, well and truly kept and performed on their part all things therein contained by them to be kept and performed, according to the true tenor and effect of said indenture, to wit, at Bennington aforesaid; yet, protesting that the defendants, since the making of said last-mentioned indenture have not performed, fulfilled, or kept anything in said inden-

ture contained on their part to be kept, performed, and fulfilled, according to the true tenor and effect of said indenture, the plaintiffs
32 in fact say, that the defendants did not at the termination of said lease, to wit, on the 15th day of January, 1867, return said last-mentioned railroad and property to the plaintiffs, as trustees as aforesaid, in as good condition and repair in all respects, nor in any respect, as the same was at the time of making of said last-mentioned indenture, natural wear only excepted; nor did, nor would they return any part thereof in as good condition or repair according to the true intent and meaning of said indenture. But, on the contrary thereof, the defendants, during the continuance of said lease, and while they were so possessed of said last-mentioned road with the appurtenances, to wit, on the first day of January, 1860, and from thence for a long space of time, to wit, from thence until the termination of said lease, suffered and permitted the said railroad and its buildings, appurtenances, and superstructure from time to time to become and remain greatly & seriously out of repair in all respects, and to fall into a condition and state of repair far worse *far worse* than the same were in at the time of the making of said indenture last mentioned, beyond and besides the natural wear thereof, according to the true intent and meaning of said indenture, and so to continue and remain up to
33 and at the time of the termination of said lease; and up to and at the time of the return of said road to the plaintiffs, as such trustees, after the termination as hereinafter mentioned, and especially in that the defendants did suffer and allow, during the period last aforesaid, the iron rails on said road, and along the whole length thereof, to become worn and broken, destroyed and worthless; and did likewise, during the period aforesaid, suffer and permit the wooden ties used in the superstructure of said road to become and remain decayed, broken, worn out, and useless along the whole line and length of said road; and did likewise suffer and permit during the period aforsaid, the road-bed of said road to become and remain rough and uneven and without ballasting the same, and greatly out of repair; and did also suffer and permit the various water-tanks along the line of said road, and forming a part thereof and belonging thereto, to become, during the period aforesaid, and to remain damaged, broken and greatly out of repair; and the station-houses and buildings along the line of said road
34 and belonging thereto and forming a part thereof, to become and remain decayed, injured, dilapidated, and greatly out of repair; and the defendants did also, during the period aforesaid, suffer and permit the engine and car houses, machine-shops, and wood-sheds belonging to said road and forming a part thereof, to become and remain decayed, dilapidated and greatly out of repair; and did also suffer and permit the fences on both sides of the railroad along the whole length thereof, and belonging to and forming part thereof, to become and remain broken, decayed, fallen down, and destroyed; and did also, during the period aforesaid, suffer and permit the ditches on both sides of said road and forming a part thereof, on the whole line of said road, to become filled with earth and stones, to the great injury of said road-bed, and to remain so filled up; and did also, during the period aforesaid, suffer and permit the earth and stones to slide and roll down from the sides of the cuts on both sides of said road, and along the whole length thereof, in and upon and near the track of said road, and so to remain whereby the space between said sides became and is in various
35 places on said road, narrow, inconvenient, and dangerous.

And did also, during the period aforesaid, suffer and permit the earth and stones to slide and roll away from said road and road-bed, on both sides thereof, at all places along said road where the track of the same passes over and upon fills, so that in all such places the road-bed of said road has become and remains very narrow, inconvenient, and dangerous.

And the defendants did likewise, during the period aforesaid, suffer and permit one of the station-houses aforesaid, situate in Wallingford, in the county of Rutland, on the line of said railroad, and belonging thereto, and necessary to its use, and being of great value, to wit, of the value of one thousand dollars, and which at the time of the making of the said last-mentioned indenture was in good condition and repair, to become and remain, up to and at the termination of said lease, burned down and wholly destroyed.

And the plaintiffs aver that the defendants left said last-mentioned railroad, buildings, and appurtenances, and returned the same to the possession of the plaintiffs, as trustees as aforesaid, at the termi-
36 nation of said lease last-mentioned, to wit, on the 15th day of January, A. D. 1867, at Bennington aforesaid, in the condition and state of repair last aforesaid, and especially in respect to the said rails, ties, road-bed, station-houses, and other buildings, fences, ditches, cuts and fills, and water-tanks, belonging to and forming a part of said road and appurtenances; and that in all the respects and particulars aforesaid, and in many others, said road, buildings, and appurtenances, and said rails, ties, road-bed, station-houses, and other buildings, water-tanks, fences, ditches, cuts and fills thereto belonging, were then and there, at the time of said return, in a far worse condition and state of repair than the same were at the time of the making of said last-mentioned indenture, beyond and besides the natural wear thereof, according to the true intent and meaning of said last-mentioned indenture; and all from want of seasonable and ordinary and necessary repairs that should have been from time to time performed and bestowed thereon by the defendants during the continuance of said lease in the reasonable use and operation of said road, and according to such
37 true intent and meaning; whereby the value of said last-mentioned road, buildings, and appurtenances has been greatly diminished, to wit, to the amount of two hundred thousand dollars, and large and immediate repairs of the same have become and are necessary, and must be incurred by the plaintiffs as trustees as aforesaid, to wit, to the amount of two hundred thousand dollars.

And the plaintiffs aver that, though reasonable application was made by them to the defendants, and within a reasonable time after the making of the said last-mentioned indenture, to wit, on the first day of April, 1857, at Bennington aforesaid; and the defendants were then and there requested to procure the attendance of some one of the railroad commissioners of the State of New York for the purpose of passing over said road with the said Charles Linsley, and of examining the same as to its condition and state of repair, as provided in said indenture; and the said Linsley was soon after the making of said indenture, and before the state of the weather and the season rendered it practicable to make an examination of said road as to the condition and state of repairs of the same, to wit, on the first day of April,
38 1857, at Bennington aforesaid, retained and employed by the defendants as their attorney and legal counsel in the matter of their rights and possession under said indenture; and said Linsley

being then and there an attorney and counsellor at law in the courts of this State.

And the said Linsley did thereupon, afterwards, to wit, on the day and year last aforesaid, at Bennington aforesaid, refuse, for the expressed reason that he was so retained and employed, to act in the matter of making such examination, though the plaintiffs, as trustees as aforesaid, seasonably applied to said Linsley and requested him to do so.

And the defendants did not, nor would upon such seasonable application, nor at any time, procure the attendance of either one of said railroad commissioners for the purpose of making such examination.

And no such examination of said road and property was ever made under said agreement in said last-mentioned indenture by said Linsley, or by either of said commissioners.

And said Linsley afterwards and before the termination of said
39 lease, to wit, on the first day of November, 1862, deceased.

And so the plaintiffs, in fact, say that the defendants, though often requested so to do, have not kept the said covenants in said last-mentioned indenture contained, and so by them made as aforesaid, in manner and form as aforesaid, but have broken the same.

And also for that whereas the plaintiffs, as trustees of the holders of the first-mortgage bonds of the Western Vermont Railroad Company, were, before the time and at the time of the making of the indenture hereinafter mentioned, seized and possessed of a certain other railroad known as the Western Vermont Railroad, and of the buildings, privileges, and appurtenances *hither*to belonging, and, as such trustees, had good right to lease the same for the period of ten years; and being so thereof seized and possessed, heretofore, to wit, on the 16 day of January, 1857, at Bennington aforesaid, by a certain other indenture then and there made between the plaintiffs, as such trustees, on the one part, and the defendants on the other part, the counterpart of which said indenture, sealed with the corporate seal of the defendants and duly witnessed and acknowledged, the plaintiffs now bring here
40 into court, the date whereof is the day and year last aforesaid, the plaintiffs, as trustees as aforesaid, did lease and demise to the defendants, for the period of ten years from and including said date, subject to the conditions in said last-mentioned indenture expressed, a certain railroad known as the Western Vermont Railroad, as located and hereafter occupied under the charter of the Western Vermont Railroad Company, with all the buildings, privileges, and appurtenances thereto belonging, and the full right to hold, use, and operate the same in conformity with said charter, together with all the tools, implements, and furniture belonging to the plaintiffs, as such trustees, and then on or about said road, and used for operating or repairing the same, yielding and paying therefor to the plaintiffs, as such trustees, as rent for said last-mentioned road and property, the sum of twenty-five hundred dollars per month for the first year of said lease, and the sum of three thousand dollars per month during all the succeeding years thereof.

And the defendants did, then and there, in and by said last-mentioned indenture, covenant and agree with the plaintiffs, as trustees as
41 aforesaid, (amongst other things,) to return said road and property, both real and personal, at the termination of said lease, in as good condition and repair, in all respects, as the same were then in, natural war only excepted, as by the said last-mentioned indenture, reference thereto being had, will more fully and at large appear.

And it was in and by said last mentioned indenture (amongst other

things) further mutually covenanted and agreed between the plaintiffs, as trustees aforesaid, and the defendants, that Charles Linsley, of Rutland, Vermont, and either one of the (then) present railroad commissioners of the State of New York, provided his attendance should, upon seasonable application, be procured by the defendants, should pass over and examine said road and property as soon after the date of said last-mentioned indenture as the state of the weather and the season should render it practicable, and should make an examination as to the condition and state of repair of the same. And that upon the termination of said lease from any cause, the same parties, or the survivor of them, if either of them should be living, and should be where his attendance could be obtained, should make a like examination for the purpose of determining whether said last-mentioned road and property were in the condition and state of repair required by said last-mentioned indenture, and if not to appraise the difference in value, the decision so made to be final between the plaintiffs and defendants.

42

Thereupon and by virtue of said last-mentioned indenture, the defendants then and there entered upon the said demised railroad with the buildings, privileges and appurtenances, and property, and became thereof possessed and continued so thereof possessed from thence until the 16th day of January, 1867, when the said lease and demise ended and determined, to wit, at Bennington aforesaid.

And although the plaintiffs, as trustees as aforesaid, have always, from the time of the making of said last-mentioned indenture, hitherto well and truly kept and performed on their part all things therein contained to be kept and performed according to the true intent and meaning of the same, to wit, at Bennington aforesaid, yet, protesting that the defendants, since the making of said last mentioned indenture, have not performed, kept, or fulfilled anything in said indenture contained on their part to be kept, performed, and fulfilled according to the true tenor and effect of said indenture.

43

The plaintiffs in fact say that the defendants did not, at the termination of said last-mentioned lease, to wit, 15th day of January, 1867, return said last-mentioned road and property to the plaintiffs, as trustees as aforesaid, in as good condition and repair in all respects, nor in any respect, as the same were in at the time of the making of said last-mentioned indenture, natural wear thereof only excepted; nor did nor would return the same or any part thereof in such good condition, and repair, according to the true intent and meaning of said indenture. But, on the contrary thereof, the defendants did, during the continuance of said last-mentioned lease, permit and allow one of the station-houses belonging to said last-mentioned road, and on the line thereof and necessary to its use, situate in Wallingford aforesaid, of great value, to wit, of the value of one thousand dollars, and which, at the time of the making of said last mentioned indenture, was in good condition and repair, to become and remain up to and at the termination of said lease, burned down and wholly destroyed.

44

And the plaintiffs aver that the defendants left said last-mentioned railroad, buildings, and appurtenances, and returned the same to the possession of the plaintiffs, as trustees as aforesaid, at the termination of said lease, to wit, on the 15th day of January, 1867, in the condition and state of repair aforesaid, in respect to the said station-house at Wallingford aforesaid and without rebuilding or in any way supplying the loss of the same. And in this respect and many others said road, buildings, and appurtenances were, then and there, in a far worse condition and state of repair, than the same were at the time of the making

of said last-mentioned indenture, beyond and besides the natural wear thereof, according to the true intent and meaning of said indenture; whereby the value of said last-mentioned railroad appurtenances, buildings and property have been greatly diminished, to wit, to the amount of two hundred thousand dollars, and large and immediate repairs
45 of the same have become and are necessary, and be incurred by the plaintiffs, as trustees as aforesaid, to wit, to the amount of two hundred thousand dollars.

And the plaintiffs aver that, though seasonable application was made by them to the defendants, and within a reasonable time after the making of said last-mentioned indenture, to wit, on the first day of April, 1857, to wit, at Bennington aforesaid, and the defendants were, then and there, requested by the plaintiffs to procure the attendance of some one of the three railroad commissioners of the State of New York for the purpose of passing over said last-mentioned road with the said Charles Linsley, and examining the same as to its condition and state of repair, as provided in said indenture last-mentioned, and the plaintiffs were, then and there, ready and willing, and offered to the defendants to procure the attendance of said Linsley for that purpose.

Yet the defendants did not, nor would, upon such seasonable application, nor at any time, procure the attendance of either of said railroad commissioners for that purpose, and no such examination of said last-mentioned railroad & property was ever made under said agree-
46 ment, in said last-mentioned indenture, either by said Linsley or by either of said railroad commissioners, and said Linsley afterwards and before the termination of said lease, to wit, on the first day of November, 1862, deceased.

And so the plaintiffs in fact say that the defendants, though often requested so to do, have not kept the said covenants so by them made, as last aforesaid, and in this court set forth in manner and form as aforesaid, but have broken the same; all which is to the damage of the plaintiffs as trustees as aforesaid, as they say, three hundred thousand dollars, for the recovery of which, with just *cause*, they bring this suit.

And you are further commanded to summon John Gregory Smith, of St. Albans, in the county of Franklin, and John B. Page and Edwin Blanchard, of Rutland aforesaid, trustees of the Rutland and Burlington Railroad Company,

trustees of the said Troy and Boston Railroad Company, the defendants, to appear before said court at the time and place aforesaid, and make disclosure according to law, of the
47 goods, chattels, rights or credits of said Troy & Boston Railroad Company, which the said John Gregory Smith, or the said John B. Page and Edwin Blanchard, trustees of said Rutland and Burlington Railroad Company, may have in their, or any or either of their hands and possession.

Fail not, but of this writ make due service and return according to law.

Dated at Bennington, in said county of Bennington, this 16th day of January, 1867.

THOMAS WHITE,
Justice of the Peace.

W'm S. Southworth, recognized to the defendants in the sum of one hundred dollars, as security for costs of prosecution, as the law directs.

THOMAS WHITE,
Justice of the Peace.

W'm S. Southworth, recognized to each of said trustees in the sum of one hundred dollars, as security for costs of prosecution, as the law directs.

THOMAS WHITE,
Justice of the Peace.

48 STATE OF VERMONT,
Bennington County, ss:

At Pownal, in said county, on the 16th day of January, A. D. 1867, I, then, by virtue of this writ, *I* attached, as the property of the within-named defendants, one railroad steam-engine or locomotive, two passenger-cars, one baggage-car, and one freight-car, this attachment being subject to two other attachments—one, George Briggs & Shepherd Knapp, Troy & Boston Railroad Company; and one, the Bennington and Rutland R. R. Company. At Bennington, in said county, on the 4th day of May, 1867, I delivered a true and attested copy of this attachment, with a list of the property so attached endorsed thereon, with my return hereon thereon endorsed, to A. B. Gardner, agent & attorney for said railroad company within this State.

Attest: L. POWERS, *Sheriff.*

Fees: Travel, 37 miles, 3.70; copy, 8.25—$11.95.

STATE OF VERMONT,
Bennington County, ss:

AT BENNINGTON, *January 16th*, 1867.

I, then, by direction of the plaintiffs' att'y, with this writ to me directed, served the same by leaving in the hands of John Gregory Smith, as trustee of the within-named defendants, a true and attested copy of this writ, with this, my return, endorsed thereon, attested by
49 me; and, on the same day, at Bennington, with this writ and by direction of the plaintiffs' att'ys, I attached, as the property of the within-named defendants at Bennington, in said county, five railroad locomotives, (engines with tenders attached,) named as follows, to wit: John Paine, Daniel Robinson, R. P. Hart, J. P. Baker, and Wallingford; two railroad passenger-cars, one passenger and baggage car, two baggage-cars, twelve box freight-cars, and thirteen platform-cars and the wood thereon, being loaded with wood, containing about eighty cords of five-foot wood; also, about 13 cords of four-foot wood, lying near the engine-house, on the east side of the track, in Bennington; and, on the same day, at Shaftsbury, in said county, at South Shaftsbury, near the depot, one box-car; at North Shaftsbury depot, two box-cars; at Arlington depot, in said town of Arlington, two box-cars and three platform-cars; and, on the 17th day of January, 1867, at Manchester, in said county, at the depot of the Western V't R. R. *road*, I also attached, as the property of said defendants, six railroad platform-cars, five box-cars, one passenger-car, (broken,) and one locomotive railroad engine and tender, to wit, by the name of D. S. Vail; at East Dorset, two box-cars, near the depot, in the town of Dorset, in said
50 county; at North Dorset station, three box-cars and three

platform-cars; at Mount Tabor, at the station called the Danby depot, in the county of Rutland, two box-cars; at South Wallingford, in said town of Wallingford, near South Wallingford depot, in said county, two platform-cars; at Wallingford depot, in said town, two box-cars and two platform-cars; at Rutland, in said county, two platform-cars, and five box-cars, and three passenger-cars, one baggage-car. All of the above cars are railroad cars, in all, thirty-one platform railroad cars, thirty-six box railroad cars, three baggage railroad cars, six passenger-cars, (one of them broken,) one baggage and passenger railroad car, and six railroad locomotive engines and tenders; and, on the same day, with this writ, I attached, as the property of the within-named defendants at Wallingford, in the county of Rutland, it being 17th day of January, 1867, by direction of the plaintiffs' attorneys, *I attached* about five hundred cords of cord-wood, now lying and being at and near the railroad station in said Wallingford, known as South Wallingford station, to wit, one large pile, at or near said station,
51 on the east side of said railroad, and a small pile on the west side of said railroad station, saved for railroad use, one pile north of said station, on the line of said road, on the east side of said road, and one pile south of said station, on or near the line of said road, all in said town of Wallingford, in all, estimated at about five hundred cords of wood; and, on the same day I left on file, in the town clerk's office of said town of Wallingford, a true and attested copy of this writ, with a list and description of the property attached, with this, my return, endorsed thereon, *thereon attached* by me.

At Mount Taber, in said county of Rutland, on the same 17th day of January, 1867, with this writ I attached, as the property of the within-named defendants, by direction of the plaintiffs' att'ys, all the cord-wood now lying and being in said *said* town of Mount Taber and along the line of said railroad, on both sides of the railroad, about and near to the railroad track, on both sides thereof, and particularly ten piles of wood on the easterly side of said track, within or about two or three miles from said railroad station, in said Mount Taber, called
52 Danby station; and also all wood and cord-wood piled near to and at the station aforesaid; and also all slabs there situated; also, all wood and cord-wood piled along the said track, on either side or both sides thereof, and situated between said station and Sabin's Crossing and the line of the town of Dorset, in said Mount Taber; and all the fence-posts now lying along the line of said railroad, on either side. And on the same day I left on file, in the town-clerk's office of said town of Mount Taber a true and attested copy of this writ, with a list and description of the property attached, with this my return endorsed thereon, attested by me.

And afterwards, to wit, on the same 17th day of January, 1867, by direction of the plaintiffs' attorneys, at Dorset, in the county of Bennington, with this writ, I attached, as the property of the within-named defendants, all the cord-wood or wood of any description lying, or being along, about, or near the railroad track, on both sides thereof, in said town of Dorset; and also all the cord-wood now lying or being at or near the station called the North Dorset station, in said town of
53 Dorset, meaning all the cord-wood in said town of Dorset, on the line of railroad belonging to said defendants. And on the same day I left on file in the town-clerk's office of said town of Dorset a true and attested copy of this writ, with a list and description of the property attached, with this my return endorsed thereon, attested by me.

Afterwards, to wit, at Manchester, in said county of Bennington, on the same 17th day of January, 1867, with this writ to me directed, and by the direction of the plaintiff's attorneys, I attached, as the property of the within-named defendants, all the coal, wood, and railroad ties now lying and being near or adjacent to the said track through said town; and also all the cord-wood, ties, and lumber deposited on lands or lots adjoining the railroad aforesaid. And on the same day I left on file in the town-clerk's office of said town of Manchester a true and attested copy of this writ, with a list and description of the property attached, with this my return endorsed thereon, attested by me.

And afterwards, to wit, at Sunderland, in said county, on the same 17th day of January, 1867, with this writ to me directed, and by
54 direction of plaintiffs' attorneys, I attached, as the estate of the within-named defendants, all the lands in the town of Sunderland, with the appurtenances, bounded as said town of Sunderland is bounded. And on the same day I left in the town-clerk's office of said town of Sunderland a true and attested copy of this writ, with a list and description of the estate so attached, with this my return endorsed thereon.

And I have caused the substantial points to be thus recorded in the rec*ents* of lands in said town. And on the same day, with this writ I attached, as the property of said defendants all the railroad ties and cord-wood now lying and being at or near said railroad on both sides thereof of said railroad, in said town of Sunderland, contiguous to said railroad, meaning all the cord-wood and railroad ties in said town of Sunderland belonging to said defendants. And on the same day I left on file in the town-clerk's office in said town of Sunderland a true and attested copy *of said* writ, with a list and description of the property attached, with this my return endorsed thereon, attested by me.

55 Afterwards, to wit, at Arlington, in said county, by direction of plaintiffs' attorneys, on the same 17th day of January, 1867, with this writ, I attached, as the property of the within-named defendants, all the cord-wood and railroad ties, and being on the line of said Western Vermont Railroad, in said town of Arlington, on both sides of said railroad, and contiguous to said road, in said town of Arlington, meaning all the cord-wood and railroad ties belonging to said defendants in said town of Arlington. And on the same day I left on file in the town-clerk's office of said town of Arlington a true and attested copy of this writ, with a list and description of the property attached, with this my return endorsed thereon, attested by me.

And afterwards, to wit, January 18, 1867, at Shaftsbury, with this writ, by direction of the plaintiff's attorneys, I attached, as the property of the within-named defendants, all the railroad ties, fence-posts, and cord-wood now lying and being at or near the railroad stations in said Shaftsbury; and all the railroad ties, fence-posts, and cord-wood on the line of said railroad, on both sides of said railroad, in said town of Shaftsbury, meaning all the cord-wood, fence-posts,
56 and railroad ties of any kind belonging to said defendants in said town of Shaftsbury.

And on the same day I left on file in the town-clerk's office, in said town of Shaftsbury, a true and attested copy of this writ, with a list and description of the property attached, with this my return endorsed thereon, attested by me.

And afterwards, to wit, at Pownal, on the same 18th day of January, 1867, I made further service of this writ, by direction of the plaintiff's attorneys within named, I attached, as the property of the within-named

defendants, all the cord-wood now lying and being near the railroad station called the South Pownal station of the Troy and Boston Railroad; also, all the cord-wood now lying and being near the railroad called the North Pownal station; also, all the spruce boards lying near said railroad station; also, all the cord-wood now lying along the line of said railroad, on both sides of said railroad, in said town of Pownal; also, all the spruce boards near said railroad, between the Dunn bridge and the Petted bridge, in said town of Pownal, being in all about
57 25,000 feet of boards, with about 60 cords of cord-wood. And on the same day I left on file in the town-clerk's office of the said town of Pownal a true and attested copy of this writ, with a list & description of the property attached, with this my return endorsed thereon, attested by me.

And afterwards, to wit, on the 3d day of May, 1867, I left in the hands of Abraham B. Gardner, as the agent and attorney for the Troy and Boston Railroad Company, the defendants named in this writ, a true and attested copy of this writ, with a list and description of the estate and property attached, with this my return endorsed thereon, attested by me.

Attest: JASPER VIALL,
An Indifferent Person.

Fees:

Travel 200 miles	20 00
10 copies	90 00
Paid town clerks	1 00
Over	111 00
Forward	110 00
Receiving property	350 00
Moving property	114 62
Oil, waste, &c.	10 00
Work done on engines	50 00
4½ mos. steering engines, freight and passenger cars	450
	$1,085 62

58 Sworn to this 4th day of June, 1867, before me.
THOMAS WHITE,
Justice of the Peace.

To Jasper Viall, of Bennington:

The undersigned having been appointed by you to examine and appraise certain cord-wood, railroad ties, and fence-posts, property attached by you as an indifferent person duly authorized on a writ in favor of Shepherd Knapp and George Briggs, trustees, against the Troy and Boston Railroad Company, which suit is now pending in the county court within and for the county of Bennington, having been duly sworn do hereby certify that we have examined the property so attached, and being satisfied that the defendants in said writ have been informed of the attachment of the same, we do, upon such examination, find, and are of the opinion, that said property, as set forth in the schedule following, is all and every part of it liable to perish and be greatly reduced in value by keeping, and we do appraise the several parcels
59 of said property at the sums set against the several parcels in

said schedule respectively, amounting in the whole to eight thousand nine hundred and ninety-five dollars and ten cents as its true value in money.

ISAAC WEEKS.
JEROME J. HILL.
J. E. McNAUGHTON.

KNAPP & BRIGGS
v.
TROY & BOSTON R. ROAD.

Schedule of cord-wood, ties, and fence-posts attached Jan'y, 1867, in the above-entitled suit

At South Wallingford, in the town of Wallingford, Rutland County, at the railroad depot, about 400 cords 4 ft. wood	South Wallingford, Wallingford,			$1,009 50
Mt. Taber about 36 cords	Mt. Tabor,			
On Sanford Baker's land, 35 cords	"	"		
Tabor crossing, on E. A. Millard, 140	"	"		
On Hiram Griffith, 50	"	"		$2,589 25
Between the two tressel-works, 140	"	"		
30 cords north of north tressel-works, 110	"	"		
At Danby station; about 100, part hard and part soft wood	"	"	Ties	$81 00
About 265 cords on Nichols' land, 265	"	"		
About 3 miles north of station, 62¼	"	"		
60 1,800 tamerack fence-posts, near lands of John Griffith	"	"		

BENNINGTON CO.

Dorset: about 75 cords at Hurlbut's crossing; 27 at Burton's crossing—102; at Gravel Pit 26 cords; 250 cords at Adams' crossing—276.	Dorset, "			$1,707 38
Manchester: about 150 at Washout, near Dorset line; about 100 cords at McNaughton's crossing; about 1,000 cords at Benedict's crossing; about 80 cords at Brick Lane crossing; about 100 cords at Penn Farm crossing, on lands of C. Burton—1,330.	Manchester, " " "			$1,565 88
Sunderland wood-yard about 200 cords; 4 cords at R. R. station; about 100 railroad ties.	Sunderland, "			631 12 30 00
Arlington depot: about 5 cords of wood near Geo. Vaughn's; about 450 fence-posts, 600 railroad ties, 100 cords of wood at Kent's crossing; 91¼ cords at Crapet's crossing, 132¾; 182 railroad ties.	Arlington, " " "		Posts Ties	1,023 37 $18 00 249 60
Bennington station, Bennington, 18 cords wood.	Bennington.			
				$8,995 10

SHEPHERD KNAPP AND GEORGE BRIGGS, Trustees, The Troy & Boston R. R. Co. } In Bennington County court.

61 *Action of covenant broken.*

I, Jasper Vaill, of Bennington, having, as indifferent person, duly authorised, made service of the original writ in the above-entitled cause, and the suit being still pending in said court, do hereby make the following additional return agreeable to the statute in such case made and provided, (General Statutes, chap. 33d of title 15,) and do hereby request the clerk of said court to append the same to said writ, viz:

STATE OF VERMONT,
Bennington County, ss:

The parties, not having consented to the sale of any part of the property attached by virtue of said writ as provided in the aforesaid chapter of the General Statutes, the plaintiffs did, by their attorney, W'm S. Southworth, on the 16th day of September, 1867, at Bennington, in said county, apply to me, and request me to cause the cord-wood, railroad ties, and fence-posts attached on said writ, and not before receipted, to be appraised, and afterwards sold, or otherwise disposed of in the manner provided by said statutes, chap. 33d, representing that said
62 cord-wood, railroad-ties, and fence-posts are liable to perish or waste, or be greatly reduced in value by keeping. And upon such application and requests by the plaintiffs to me, I gave notice to the other party, The Troy & Boston Railroad Company, by delivering to Abraham B. Gardner, agent and attorney of the said Troy & Boston Railroad Company, a written notice of such application and request of the plaintiffs, on the 16th day of September, 1867. And I prepared a schedule of said goods, and appointed three disinterested persons who were acquainted with the nature and value of such property, to wit, Isaac Weeks, Jerome J. Hill, and J. E. McNaughton, and such persons were duly sworn by me, and also by Harmon Canfield, esq., justice of the peace, in and for said county of Bennington, to the faithful discharge of their duty as appraisers in the case. And said appraisers did proceed to examine and did examine said property so attached, to wit, all the cord-wood, railroad ties, and fence-posts not before receipted, and being satisfied that the other party, The Troy and Boston Railroad Company had been informed of the attachment of said property,
63 they, the said appraisers, did proceed to appraise the same as provided by law; and said appraisers did examine said property so attached, and they were of opinion that all of the said property, the cord-wood, railroad ties, and fence-posts are liable to perish and waste, and to be greatly reduced in value by keeping. And said appraisers did proceed to appraise the same according to their best skill and judgment at the value thereof, in money, to wit, at the sum of eight thousand nine hundred and ninety-five dollars and ten cents ($8,995.10.) And afterwards, on the 26th day of September, 1867, I advertised the cord-wood, railroad ties, and fence-posts in the town of Arlington, in the county of Bennington, so attached by me to be sold by posting up a notification at the railroad depot in said Arlington, a public place that said cord-wood, ties and posts so attached and situated at said Arlington, would be sold at public auction, on the 10th day of October, 1867; and on said 10th day of October, said sale was adjourned to the 14th day of October, 1867, at the same place and time; and on that day again adjourned to the 21st day of the same month, at the same
64 place and time; and on that day again adjourned to Nov. 1st, 1867, at the same place and hour; and on that day again adjourned to the 9th day of November, 1867, at the same place and hour. And on the same 26 day of September, 1867, I advertised the cord-wood and railroad ties in the town of Sunderland attached by me to be sold, by putting up a notification at the railroad depot, in said Sunderland, a public place, that said wood and ties would be sold at public auction, on the 10th day of October, 1867; and on the said day I adjourned said sale to the 14th day of the same month, at the same place and hour; and on said day I again adjourned said sale to the 21st day of the same month at the same place and hour; and on that day I again adjourned said sale to the first day of November, 1867, at the same place

and hour; and on that day again adjourned said sale to the 9th day of the same month, at the same place and hour.

And on the same 26th day of September, 1867, I advertised, for sale at Manchester, all the cord-wood in said town attached by me, by
65 putting up a notification at the railroad depot in said town, a public place, that I would sell all said wood that was on Benton's land near the Poor-farm crossing, on the 10th day of October, 1867; and on said day I adjourned said sale to the 14th of the same month, at same time and place; and on that day adjourned said sale to the 21st day of the same month at the same time and place; and on that day adjourned said sale to the first day of November, 1867, at the same time and place; and on that day again adjourned said sale to the 9th day of November, 1867, at the same time and place.

And on the same 26 day of September, 1867, I advertised for sale all the remainder of the wood so attached by me in said town, by putting up a notification at said railroad depot, that I would sell the same on the 11th day of October, 1867; and on that day I adjourned said sale to the 18th day of the same month, at same place and hour; and on that day again adjourned said sale to the 29th day of the same month, at the same time and place; and on that day again adjourned said sale to
66 the 7th day of November, 1867, at the same time and place.

And, on the same 26th day of September 1867, I advertised for sale at public auction all *all* the cord-wood so attached by me in the town of Dorset by putting up a notification at the railroad depot, a public place in said town that I would sell the same on the 11th day of October, 1867; and on that day I adjourned said sale to the 18th day of same month at the same time and place; and on that day I again adjourned said sale to the 29th day of the same month at the same time and place; and on that day I again adjourned said sale to the 7th day of November, 1867, at the same time and place.

And on the same 26th day of September, 1867, I advertised for sale at public auction all the cord-wood and fence-posts so attached by me in the town of Mount Taber by putting up a notification at the railroad depot in said town, a public place, that I would sell the same on the 12th day of October, 1867, and on that day I adjourned said sale to the 19th day of October, 1867, and at the same time and place; and on
67 that day I adjourned said sale to the 30th day of October, 1867, at the same time and place; and on that day I adjourned said sale to the 8th day of November, 1867, at the same time and place.

And on the same 26th day of September, 1867, I advertised for sale, at public auction, all the cord-wood so attached by me in the town of Wallingford, by putting up a notification at the railroad depot in South Wallingford, in said town of Wallingford, a public place, that I would sell the same on the 12th day of October, 1867; and on that day I adjourned said sale to the 19th day of October, at the same time and place; and on that day I again adjourned said sale to the 30th day of October, 1867, at the same time and place; and on that day I adjourned said sale to the 8th day of November, 1867, at the same time and place.

And before the respective days to which the sale aforesaid property was last adjourned as aforesaid, the said defendants did give to me satisfactory security for the payment of said appraised value of such property or to satisfy such judgement as shall be recovered in the said suit in which the goods were attached, if demanded within
68 the time during which the said goods would be held by said attachment, and to indemnify me from all costs and damages that I may sustain, if such payment is not made within the time aforesaid.

Whereupon I proceeded no further to sell said property, but delivered the same to said defendants agreeably to the statute, section 44 of chapter 33, in such case made and provided.

Attest:

JASPER VIALL,
An Indifferent Person Authorized.

Bill of fees.

Sworn notice to def'ts	1 00
Four days measuring & expenses	25 00
Appointing and notifying app's	6 00
Paying same for four days each, $25	75 00
Four days self	25 00
Advertising	2 04
24 adjour'ments	3 38
681 miles travel	68 00
	$205 42

BENNINGTON, COUNTY, *ss:*

BENNINGTON, *Nov.* 27, 1867.

69 Personally appeared Jasper Viall, and made oath that the foregoing returns by him subscribed, and the facts therein stated are true.

Before me—

W'M. S. SOUTHWORTH,
Master in Chancery.

Additional returns filed Nov. 27 1867.

JOHN V. HALL, *Clerk.*

COUNTY CLERK'S OFFICE,
Bennington, V't, Feb. 17, 1868.

I certify that the foregoing is a true copy of the original now on file in my office.

JOHN V. HALL, *Clerk.*

[5 c't rev. stamp.]

70 (Indorsed:) Shepherd Knapp et al. The Troy & Boston R. R. Co. Ben. Co. c't, June term, 1867. W'm S. Southworth, att'y. Certified copy (C.) Filed July 28, 1868. B. B. Smalley, clerk.

71 And at the same time filed certified copies from Bennington County court of the defendants' pleas, in the *am'ts* and figures following.

Bennington County court, June term, 1867.

KNAPP AND BRIGGS
v.
THE TROY AND BOSTON RAILROAD COMPANY.

And the said defendants, by their attorneys, come and defend the wrong and injury, who, &c., and say: That the said indenture is not

the deed of the said Troy and Boston Railroad Company. And of this the said defendants put themselves upon the country.

And for further plea in this behalf, as to the said supposed breaches of covenant in the said declaration above assigned, the said defendants, by leave of the court for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith: That the said plaintiffs ought not to have or maintain their aforesaid action against them, the said defendants, because they say that the said
72 Boston Railroad Company have not broken the said covenant' in the said declaration mentioned, or any or either of them, in manner and form as the plaintiffs hath above thereof declared against them; and of this they put themselves upon the country.

And for further plea in this behalf, as to the said supposed breeches of covenant in the said declaration above assigned, the said defendants, by like leave of the court for the purpose first had and obtained, &c., saith: That the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say, that they, the said defendants, did return and surrender up to the said plaintiffs, at the expiration of the time in the said indenture mentioned, to wit, on the day of , A. D. 186 , at Bennington, in said county, the said Western Vermont Railroad, together with all the property in said indenture described, real and personal, in as good condition and repair in all respects, as it was when the said indenture was executed and delivered and the said defendants entered into possession of said railroad and property under and by virtue of the provisions thereof, its natural wear during the said term excepted. And of this the said
73 defendants put themselves upon the country for trial.

And for further plea in this behalf, as to the said supposed breaches of covenant in the said declaration above assigned, the said defendants, by like leave of the court for this purpose first had and obtained, &c., saith: That the said plaintiffs ought not to have or maintain the aforesaid action thereof against them, because they say that, from the time they, the said defendants, entered into the possession of the said Western Vermont Railroad and property under the indenture on the said declaration mentioned, and during the continuance of the term in said declaration also mentioned, did well and sufficiently repair, maintain, and keep the said railroad, its buildings, appurtenances, superstructure, iron rails, fences, bridges, culverts, ditches, embankments, ties, water-tanks, and all and singular the premises and property in the said declaration mentioned, in as good and sufficient repair as the same were when demised to the said defendants by the said plaintiffs and at the termination of said term, and did yield up the same in as good condition and repair in all respects as the same were in at the time of the
74 making of the said indenture, its natural wear excepted, during the said term, according to the form and effect of the said indenture, to wit, at Bennington, aforesaid; and of this the said defendants put themselves upon the country for trial.

A. B. GARDNER AND
TARRANT SIBLEY,
Att'ys for Def't.

75 (Indorsed:) Knapp & Briggs v. Troy & Boston R. R. Co. Def't's plea. Filed Sept. 19, 1867. D. Webster Dixon, deputy clerk. Filed July 28, 1868. B. B. Smalley, clerk.

76 And at the same time filed a certified copy from said Bennington County court of the plaintiff's replication to said pleas.

Bennington County court. December term, 1868.

KNAPP & BRIGGS
v.
THE TROY AND BOSTON RAILROAD COMPANY. } Active covenant.

And the said Knapp & Briggs, as to the plea of the said Troy and Boston Railroad Company by them firstly above pleaded, and whereof they have put themselves upon the count'y, do the like.

And as to the plea of the said Troy and Boston Railroad Company by them secondly above pleaded, and whereof they have put themselves upon the count'y, the said Knapp and Briggs do the like.

And as to the plea of the said Troy and Boston Railroad Company by them thirdly above pleaded, and whereof they have put themselves upon the count'y, the said Knapp & Briggs do the like.

And as to the plea of the said Troy and Boston Railroad Company by them fourthly above pleaded, and whereof they have put them-
77 selves upon the count'y, the said Knapp and Briggs do the like.

By E. J. PHELPS AND
W'M S. SOUTHWORTH,
Their Attorneys.

(Indorsed:) Knapp & Briggs vs. The Troy and Boston Railroad Company. Covenant. Replication. Filed this 25th day of March, 1868. Cha's W. Swift, deputy clerk.

A true copy of the original.

CHA'S W. SWIFT,
Dep'ty Clerk.

Filed July 28, 1868.

B. B. SMALLEY, *Clerk.*

78 And at the same time filed a certified copy of the additional pleas of the defendants, in the words and figures following:

Bennington County court. December term, 1867.

SHEPHERD KNAPP ET AL.
TROY & BOSTON RAILROAD CO. }

And now the said defendants, by their attorneys, by leave of the court, come and *and* defend the wrong and injury, when, &c., and say that the said indenture is not the deed of the said Troy and Boston Railroad Company; and of this the said defendants put themselves upon the count'y.

And for the further plea in this behalf, as to the said supposed breaches of covenant in the said declaration also assigned, the said defendants, by leave of the court then for that purpose first had and obtained, according to the form of the statute in that case made and provided, saith: That the said plaintiffs ought not to have or maintain their afore-
79 said action against them, the said defendants, because they say that

they, the said Troy & Boston Railroad Company, have not broken the said covenant in the said declaration mentioned, or any or either of them in manner and form as the said plaintiffs hath thereof declared against them; and of this they put themselves upon the count'y.

And for further plea in this behalf, as to the said supposed breaches of covenant in the said declaration above assigned, the said defendants, by like leave of the court for this purpose first had and obtained, &c., saith: That the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that they, the said defendants, did return and surrender up to the said plaintiffs at the expiration of the time in the said indenture mentioned, to wit, on the day of , A. D. 186', at Bennington, in said county, the said Western Vermont Railroad, together with all the property in said indenture described, real and personal, in as good condition and repair in all respects as it was when the said indenture was executed and delivered and
80 the said defendants entered into possession of said railroad and property under and by virtue of the provisions thereof, its natural wear during the said term excepted; and of this the said defendants put themselves upon the count'y for trial.

And for further plea in this behalf, as to the said supposed breaches of covenant in the said declaration above assigned, the said defendants, by like leave of the court for this purpose had and obtained, &c., saith: That the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that, from the time they, the said defendants entered into the possession of the said Western Vermont Railroad and property under the indenture in the said declaration mentioned, and during the continuance of the term in said declaration also mentioned, did well and sufficiently repair, maintain, and keep the said railroad, its buildings, appurtenances, superstructure, iron rails, fences, bridges, culverts, ditches, embankments, ties, water-tanks, roadbed, crossings, turn-tables, cattle-*gaurds* cattle-passes, piles and framework over the stream and pond in the village of Bennington, station-houses, engine and tank-houses, machine-shops, wood-sheds,
81 and other buildings, banks and cuts, and all and singular the premises and property in the said declaration mentioned, in as good and sufficient repair as the same were in when delivered to the said defendants by the said plaintiffs, and at the termination of the said term did yield up the same in as good condition and repair in all respects as the same were in at the time of the making of the said indenture, its natural wear excepted during the said term, according to the form and effect of the said indenture, to wit, at Bennington, aforesaid; and of this said defendants put themselves upon the count'y for trial.

And for further plea in this behalf, as to the said supposed breaches of covenant as to the burning down and destroying of the station-house, situate at Wallingford, and as to the permitting and allowing of the said station-house to remain so burned down and destroyed, as in said declaration mentioned, the said defendants, by like leave of the court here for this purpose first had and obtained, according to the form of statute in such case made and provided, say that the said plaint-
82 iffs ought not to have or maintain their aforesaid action thereof against them, because they say that, after the *the* making of said indenture, and after the said defendants had entered upon and taken possession of said Western Vermont Railroad station-house, and appurtenances under said indenture, to wit, on or about the 4th day of April, A. D. 1857, at Bennington, aforesaid, Jonathan Sturgess, and

Thomas Douglass, for and on behalf of a majority in number and value of the said first-mortgage bond-holders of the said Western Vermont Railroad Company filed their bill of complaint in the court of chancery for the said county of Bennington against the said defendants and others, and therein prayed for an order of said court of chancery to restrain the said defendants from operating or using said railroad station-houses and appurtenances under said indenture, and such proceedings were then had in said court of chancery that, on or about the 8th day of May, A. D. 1857, an order was granted restraining and *defend*ing the said defendants from operating or in any manner using said Western Vermont Railroad and all its appurtenances, and,
83 there*fore*, one C. M. Davey was, by an order of said court of chancery, appointed as a receiver for said Western Vermont Railroad and all its appurtenances; and he therefore entered and took possession of said railroad, station-houses, appurtenances, under said order, and so continued in the possession of said railroad, station-houses and appurtenances, and used and operated said railroad under said order of said court of chancery and wholly excluding the defendants therefrom, until on or about the 16th day of January, A. D. 1859; and the defendants say, that while the said Western Vermont Railroad, its station-houses, and appurtenances were so in the possession of the said C. M. Davey, as receiver as aforesaid, and while the said defendants were wholly deprived of the possession and use of said Western Vermont Railroad, station-houses, and appurtenances, by the order of said court of chancery, and while they had no control of said railroad, station-houses, or appurtenances, the said station-house situate at Wallingford aforesaid, was burned down and destroyed without any permission or fault on the part of the said defendants; and this the said defendants are ready to
84 verify. Whereupon they pray judgement *of* the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

And for a further plea in this behalf the defendants, by like leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that, protesting that they, the said defendants, have not broken any of the covenants in the said indenture by them to be performed, fulfilled, and kept; but they have performed, fulfilled, and kept the same and every of them.; that in and by said indenture it was among other things, provided as follows:

"And it is agreed that Charles Linsley, of Rutland, Vermont, and either one of the present railroad commissioners of the State of New York, (provided his attendance shall, upon reasonable application, be procured by said company,) should pass over and examine said road and property, as soon thereafter as the state of the weather and
85 the season renders it practicable, and *under* an examination as to the condition and state of repairs of the same.

"And that upon the termination of the lease from any cause, the same parties or the survivor of them, if either of them is living, and when his attendance can be obtained shall make a like examination for the purpose of ascertaining whether said road and property are in the condition and state of repair required by the agreement; and if not, to appraise the difference in value, the decision so made to be final between said company and said trustees."

And the said deendants aver that they *are* ready and willing to have the said Charlesf Linsley and of the (then) present railroad commis-

sioners of the State of New York pass over and examine said road and property, as soon as the state of the weather and the season rendered it practicable, and make an examination as to the condition and state of repairs of the same, and had made arrangements for them so to do; but, before the state of the weather and season rendered it practicable for such an examination to be made, to wit, on or about the 4th day of April, A. D. 1857, Jonathan Sturges and Thomas Douglas,
86 acting or assuming to act for a majority in number and value of the first-mortgage bond-holders of the said Western Vermont Railroad Company filed their bill of complaint in the court of chancery for the county of Bennington against the said defendants, and therein praying for an order of said court of chancery to restrain the said defendants from operating and using said railroad and property, or any part thereof, and which resulted in one G. M. Davey being appointed receiver for said railroad and property by an order of said court of chancery, and in the defendants being wrested from the possession of said railroad and property, and in the defendants being kept out of the possession thereof until on or about the 16th day of January, A. D, 1859, when such proceedings were had that it was determined that said indenture of lease was valid, and that these defendants be restored to the possession of said railroad and property, to wit, at Bennington aforesaid.

And these defendants aver that, while the said railroad and property were in the possession of said G. M. Davey, as receiver as afore-
87 said, the said railroad and property became greatly out of repair, dilapidated, and depreciated in value, and requiring large and extensive repairs to be immediately made thereon, of all of which the said plaintiffs had notice, to wit, at Bennington aforesaid. And to induce these defendants to enter upon and operate said railroad, the said plaintiffs agreed with the said defendants to substitute W'm S. Eddy and Amasa Keith in the place of Charles Linsley and the railroad commissioners of the State of New York, and that the said Eddy and Keith should pass over and examine said railroad & property as soon as the state of the weather and the season should make it practicable, and make an examination as to the then condition and state of repairs of the same, and that upon the termination of said lease from any cause, the said Eddy and Keith or the survivor of them, if either of them should be living, and when his attendance could be obtained, should make a like examination for the purpose of ascertaining whether said road and property were in a condition and state of repairs required by said agreement; and if not, to appraise the difference in value, that decision so made
88 to be final between said company and said trustees.

And the said defendants aver that, in pursuance of said agreement between the said plaintiffs and the said defendants, the said Eddy and Keith were then and there substituted in the place of the said Charles Linsley and the said railroad commissioners of the State of New York.

And the said Eddy and Keith proceeded to make an examination as in said indenture provided, and the same having been made and completed, the said Eddy and Keith made report of their decision as to the then condition of the said railroad and property, both to the said plaintiffs and to the said defendants, and their said decision was then and there accepted by the said plaintiffs and said defendants, as the then condition of the state of repairs of said railroad and property.

And the said defendants aver that they thereupon entered into the possession and occupancy of said railroad and property, and made *made*

extensive repairs thereon, and put the said railroad and property in far better condition and repair in every respect than the same
89 were then in, and the said railroad and property so continued and remained at the expiration of the said lease, natural wear excepted.

And the said defendants aver that, immediately after the expiration of said lease, to wit, on the 16th day of January, A. D. 1867, they procured, and caused the said Eddy and Keith to again pass over said railroad and examine the same, and its appurtenances and property, for the purpose of ascertaining whether said railroad and property, were in the condition and state of repair required by said agreement; and if not, to appraise the difference in value; of all of which the said plaintiffs had notice.

And thereupon the said Eddy and Keith did pass over said railroad, and did make an examination of said road and property, and did, then and there, ascertain the then condition and state of repairs of said road and property. And thereupon they, the said Eddy and Keith, made their decision and report in the premises.

And the said defendants aver that the said Eddy and Keith, as the result of such examination, found and decided that said railroad
90 and properey were, at the time of the expiration of said lease in far better condition and state of repairs than the same were in at the commencement thereof. And that the value of such excess and improvement in the condition and state of repairs of said railroad and property, amounted to a large sum of money, to wit, to the sum of fifty thousand dollars. And this the said defendants are ready to verify. Whereupon they pray judgement of the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c.

By A. B. GARDNER, &
T. SIBLEY,
Def't's Att'y.

(Indorsed:) Shepherd Knapp et al. v. Troy and Boston Railroad Company. Def't's plea. Filed in office April 14, 1868. John P. Hall, clerk.

A true copy of the original.

CHA'S W. SMITH,
Dep'ty Clerk.

Filed July 28, 1868.
after folio 105.
B. B. SMALLEY, *Clerk.*

91 And therefore it was ordered by the court that the said cause be entered on the docket of this court, and it was so entered.

And thereupon E. J. Phelps, esq., of counsel for the plaintiffs, filed a motion to remand said cause to said Bennington County court, which said motion was in the words and figures following:

This indenture, executed the 16th day of January, 1857, between Shepherd Knapp & George Briggs, trustees of the first mortgage on the Western Vermont Railroad, in the State of Vermont, on the one part, and the Troy and Boston Railroad Company on the other part, witnesseth:

That the said trustees hereby lease and demise to said company, *from* the period of ten years from and including this date, subject to the conditions hereinafter expressed, the said Western Vermont Railroad, as

located and heretofore occupied under the charter of the Western Vermont Railroad Company, with all the buildings, privileges, and appurtenances thereto belonging, and the full right to hold, use, and
92 operate the same in conformity with said charter, together with all the tools, implements, and furniture belonging to said trustees, and now on or about said road, and used for operating or repairing the same.

And the said company hereby covenant and agree with the said trustees to pay them, as rent for said road and property, the sum of twenty-five hundred dollars per month for the first year of said lease, and the sum of three thousand dollars per month during all the succeeding years thereof in manner following: The rent for that portion of the month of January, 1857, included in said lease, and the rent for the month of February, 1857, and the rent for every succeeding month during the continuance of this lease to be paid in advance on the first day of the month.

And it is hereby mutually agreed that, in case of failure on the part of said company to make any of said monthly payments of rent to said trustees within ten days after the same becomes due as aforesaid, then said trustees shall have the right forthwith to terminate this lease, and to re-enter upon and to take and retain possession of said rail-
93 road and property without legal process.

And said company further covenant and agree with said trustees to return said road and property, both real and personal, at the termination of this lease, in as good condition and repair in all respects as it now is in, natural wear only excepted.

And it is agreed that Charles Linsley, of Rutland, Vermont, and either one of the present railroad commissioners of the State of New York, (provided his attendance shall, upon reasonable application, be procured by said company,) shall pass over and examine said road and property as soon hereafter as the state of the weather and the season render it practicable, and make an examination as to the condition and state of repairs of the same; and that, upon the termination of this lease from any cause, the same parties, or the survivor of them, if either is living, and when his attendance can be obtained, shall make a like examination for the purpose of determining whether said road and property are in the condition and state of repair required by this agreement; and if not, to appraise the difference in value, the decision so made to be final between said company and said trustees.

94 And it is hereby further understood and agreed that this lease is made subject to the following conditions:

That if a majority in amount of the bond-holders under said first mortgage upon said road shall, within ninety days from the date hereof, unite in giving a notice in writing to said company of their desire to terminate this lease at the expiration of one year from the date thereof, then said lease shall so terminate, and shall stand valid between the parties only as a lease for one year from the date hereof, subject, however, to the other provisions of this indenture.

And it is hereby further agreed that nothing herein contained shall be construed as creating any personal liability whatever on the part of said trustees, or of the directors of said company, either for a failure from whatever cause, in the performance of any of the stipulations of this indenture, expressed or implied, or for any other matter or thing arising from or in consequence of this indenture in any manner whatever.

In testimony whereof said parties have hereunto affixed their names and seals.

1st page, 10th line, "including" interlined.
3 " "90" on an erasure.

95 SHEPHERD KNAPP, *Trustee.* ◇

GEORGE BRIGGS, *Trustee.* ◇

JOHN J. LATTING.
ISAAC P. BAKER.

The Troy and Boston Railroad Company, by D. Tho's Vail, their president, duly authorized by said company to execute this indenture in their behalf, and to affix their corporate seal thereto.

D. THO'S VAIL, [L. S.]
Pr. Troy and Boston R. R. Co.

Sealed and delivered in the presence of—
N. FORSYTHE.
GEO. GOULD.

96 STATE OF NEW YORK,
Rensselaer County, ss :

At Troy, in said county, this 24th day of January, 1857, personally appeared before me D. Thomas Vail, president of the Troy and Boston Railroad Company, the signer and sealer of the foregoing indenture, and acknowledged the same to be his free, voluntary act and deed, executed in behalf of said company as above written.

GEO. GOULD,
A Justice of the Supreme Court of the State of New York.

STATE OF NEW YORK,
City and County of New York, ss :

Be it remembered that, on the 26th day of January, one thousand eight hundred and fifty-seven, (1857,) before me, the undersigned, John J. Lotting, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of Vermont, to take the acknowledgement of deeds, &c., to be used and recalled therein, personally appeared Shepherd Knapp & George Briggs, and severally acknowledged the foregoing instrument by them respectively signed and sealed, to
97 be their free act and deed as trustees therein described.

In witness whereof I have hereunto set my hand and *affidavit in* official seal, the day and year aforesaid.

[L. S.] JOHN J. LOTTING,
Commissioner for Vermont, in New York.

98 (Indorsed :) Shepherd Knapp & George Briggs, trustees, &c., to the Troy and Boston Railroad Company. Lease.

TOWN CLERK'S OFFICE, BENNINGTON.
Received for record March 20th, A. D. 1857, at 2 o'clock p. m.
Attest: D. F. SQUIRES,
Town Clerk.

Recorded in Book 36, pages 27, 28, 29, & 30 "A."

BENNINGTON COUNTY CLERK'S OFFICE.

Received for record March 21, 1857, and recorded in Book 10, pages 204, 5, 6.

By me— SAM'L H. BLACKMAN,
County Clerk.

STATE OF VERMONT,
Rutland County, Clerk's Office:

Received and recorded 21 March, 1857, in Book "A," pages 195 to 198.

F. W. HOPKINS,
County Clerk.

99 United States ci. court, Vermont district, July term, 1868.

SHEPHERD KNAPP & GEORGE BRIGGS
v.
THE TROY AND BOSTON RAILROAD CO.

Affidavit of A. A. Silver.

I, A. A. SILVER, on oath, say that I am now, and have been for the last five years, a resident citizen of the city of New York.

I further say that I am now the owner and holder of two bonds of the Western Vermont Railroad Company for $1,000 each, *received* by the first mortgage in said Western Vermont Railroad, whereof Shepherd Knapp and George Briggs are trustees.

Said bonds were Nos. 227 and 359, and they have never been converted into the stock of the Bennington and Rutland Railroad Company, or exchanged therefor, and have never been paid, in whole or in part, but remain in full force and effect.

I further say that I purchased said bonds from Henry G. Lapham, of the city of New York, on or about the 21st day of March, 1868, and have held them ever since.

A. A. SILVER.

100 CITY, *Court*, AND STATE OF NEW YORK,
Southern District of New York, ss:

This 29th day of June, 1868, personally appeared A. A. Silver, and made oath that the facts stated in the foregoing affidavit, by him subscribed in my presence, are true.

Before me—
[L. S.] EDWARD L. OARN,
U. S. Commissioner for the Southern Dist. of New York.

Affidavit by Henry G. Lapham.

I, HENRY G. LAPHAM, on oath, say that I am, and for the last twelve years have been, a resident citizen of the city of Brooklyn, State of New York.

I further say that, on or about the 21st day of March, 1868, I sold to A. A. Silver, of the city of New York, two bonds, of the Western Vermont Railroad Company, for $1,000 each, secured by the first mortgage on said Western Vermont Railroad, whereof Shepherd Knapp and George Briggs are trustees, and being bonds No. 227 and 359.

101 I purchased said bonds on or about the first day of August, 1867, of one O. R. Steele, of the city of New York, and held them from the time of said purchase until sold to said Silver, as above stated.

I further say that, on the 16th of January, 1867, and for over three previous I was the owner and holder of other bonds of the same issue and secured by the same mortgage, to the amount of over five thousand dollars of principal; and continued to hold and own the same until about the 24th day of August, 1867, when I sold them to Turner W. Park, of North Bennington, Vermont.

I further say that none of the bonds above mentioned were ever, while I owned them, nor since, to my knowledge, converted into or exchanged for the stock of the Bennington and Rutland Railroad Company, nor in any other way paid, satisfied, or discharged. On the same 24th August, 1867, I sold said Park 5,000 dollars more of said bonds above described, which, before that time, had belonged to citizens of New York, but were in my care.

HENRY G. LAPHAM.

CITY, COUNTY, & STATE OF NEW YORK,
Southern District of New York:

102 Personally appeared Henry G. Lapham, this 29th day of June, 1868, and made oath that the facts stated in the foregoing affidavit, by him subscribed in my presence, are true.

Before me—

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

Affidavit of Turner W. Park.

I, TURNER W. PARK, of North Bennington, Vermont, on oath, say that, on or about the 24th day of August, 1867, I purchased of Henry G. Lapham, then and now of the city of New York, certain bonds of the Western Vermont Railroad Company, secured by the first mortgage on the Western Vermont Railroad, (now the Bennington and Rutland Railroad,) whereof Shepherd Knapp and George Briggs are trustees; that I am informed, and believe, that said bonds were held and owned by said Lapham at the time of the commencement of the above-
103 entitled suit and since which sold to me as aforesaid; that said bonds amount to over ten thousand dollars of principal.

I further say that I know, by information, of the purchase of two bonds, of the same issue, for $1,000, and being Nos. 227 and 359, by A. A. Silver of said Lapham, prior to the commencement of this suit; that I am informed and believe that said Silver has ever since said purchase held and owned said bonds, and now owns and holds them; that I am acquainted with said Silver & Lapham, and know them to be resident citizens of the city of New York now, and for five years past.

I further say that I am president of said Bennington and Rutland Railroad Company, and have been president thereof since its organization, and familiar with all its business and concerns; and that none of the bonds aforesaid have ever been exchanged for, or converted into, the stock of said Bennington and Rutland Railroad Company, or otherwise paid, satisfied, or discharged.

I further say that the copy of lease hereto annexed, and marked "A," is a true and correct copy of the original lease of said road made by said Knapp & Briggs to said Troy & Boston Railroad Company,
104 referred to in the declaration in the above-entitled cause, and for a breach of the covenants of which said action is brought

I further say that said plaintiffs, Knapp & Briggs, still remain trustees of said mortgage; that their accounts have not been settled, nor have they ever been discharged from their said trust; and that I am advised and believe that they still continue liable as such trustees to their bond-holders, at least where bonds have not been exchanged or converted as aforesaid.

T. W. PARK.

CITY, COUNTY, & STATE OF NEW YORK,
Southern Dist. of New York:

Personally appeared Turner W. Park this 29th day of June, 1868, and made oath that the facts stated in the foregoing affidavit, by him subscribed in my presence, are true.

Before me—

KENNETH G. WHITE,
U. S. Commissioner S. District of New York.

105 (Indorsed:) U. S. cir. court, Vermont district. Shepherd Knapp and George Briggs v. The Troy and Boston Railroad Co. July term, 1868. Affidavits of A. A. Silver, Lapham, and T. W. Park.

106 U. S. cir. court, Vermont district. July term, 1868.

SHEPHERD KNAPP & GEORGE BRIGGS
v.
THE TROY & BOSTON RAILROAD CO.

Motion to remove cause.

And, now, the plaintiffs, by W. S. Southworth, their attorney, comes and, upon the pleadings, records, and papers on file in said cause, and upon the certified copy of lease and the affidavits of A. A. Silver, H. G. Lapham, and T. W. Park, hereto annexed and duly filed, respectfully moves the court that this cause may be dismissed from the docket and remanded to the county court for the county of Bennington, in the State of Vermont, whence the same was rendered to this court, for the reason that the same was not properly subject to such removal under any act of Congress, and is not within the jurisdiction of this court to entertain or proceed with.

By W. S. SOUTHWORTH,
Att'y for Plaintiffs.

107 To the defendants:

Please to take notice that the foregoing motion has, with the papers thereto annexed, been duly filed in court, and will be brought on for hearing on the first day of the next term of the United States circuit court for the district of Vermont, to be holden at Windsor, in the county of Windsor, on the 4th Tuesday of July, 1868, or as soon thereafter as counsel can be heard.

And that annexed to and served with this notice are true copies of said motion and of the lease and affidavits therein mentioned.

W. L. SOUTHWORTH,
Att'y for Pl'ffs.

STATE OF VERMONT,
Bennington Co., ss:

I, W'm T. Horrobin, of Bennington, on oath depose and say that, on the seventh day of July, 1868, at said Bennington, I delivered to Hon. A. B. Gardner, attorney for the defendants in the above-entitled cause, true copies of the foregoing motion and notice, and of the lease and affidavits therein referred to and hereto annexed.

Said copy of notice being signed by W. L. Southworth, esq., att'y for plaintiffs.

W'M. T. HORROBIN.

Sworn before me this 7th day of July, 1868.
[L. S.] G. W. GARDNER,
Notary Public.

108 (Indorsed:) U. S. cir. court, Vermont district. Shepherd Knapp and George Briggs v. The Troy and Boston Railroad Co, July term, 1868. Motion to remand cause and papers annexed. Filed July 4, 1868. D. A. Smalley, judge.

109 And thereupon said motion came on for hearing, and it appeared, from the evidence adduced upon said hearing, that Shepherd Knapp and George Briggs, the plaintiffs in this cause, were resident citizens of the State of New York, and that the Troy and Boston Railroad Company, the defendant corporation, was a corporation existing under the laws of the State of New York, and having its chief place of business at the city of Troy, in said State.

And it further appeared that, after this suit was entered in the county court within and for the county of Bennington, in the State of Vermont, the defendants filed their petition in said county court to have said cause removed to this court, and a hearing was had upon said petition to remove, and said Bennington County court refused to order said cause to be removed.

And it further appeared that, upon the refusal of said Bennington County court to order said cause to be removed, said defendants commenced proceedings to obtain a mandamus from this court, directed to said Bennington County court, to remove said cause to this court; and

110 thereupon Turner W. Park, president of the Bennington and Rutland Railroad Company, and the principal owner thereof, acting for the plaintiffs in this cause, and with full authority to do so, and the defendants, The Troy and Boston Railroad Company, entered into a stipulation that said Troy and Boston Railroad Company should file a motion for a mandamus in the United States circuit court for the district of Vermont, directing the removal of this cause from said Bennington County court to this court, and that said motion should be heard before Mr. Justice Nelson, one of the judges of this court; and if, upon said hearing, said judge should express the opinion that this cause was a proper one to be removed from said Bennington County court to this court, then an order was to be entered, by consent, removing said cause to this court.

And it further appeared that said motion for a mandamus came on before Mr. Justice Nelson, and, after a full hearing of the testimony and counsel for the plaintiffs and defendants, he decided that said cause was removable from said Bennington County court to this court; which said decision was in the words and figures following:

111 Cir. c't U. S., district of V't.

TROY & BOSTON R. R. CO.
vs.
SHEPHERD KNAPP & GEORGE BRIGGS.

NELSON, *C. J.*

This is a motion to remove the above cause from the State court in Bennington, V't, to the circuit court of U. S.

The only objection is that both parties are resident citizens of N. Y., the def'ts being a N. Y. corporation. The answer set up is that Knapp and Briggs are mere formal parties, without interest or responsibility in the case, which are admitted.

The Bennington and Rutland R. R. Co., a Vermont corporation, own the subject-matter of the suit, have brought it, and are prosecuting it for their *their* own benefit, and at their own expense. And under the circumstances and condition of this company and the plaintiffs, as appears from the papers and not in dispute, the trustees not only have no control of said suit, nor any right to interfere with it. As the suit, according to the laws of Vermont, must be brought in their names,
112 their names are used; but they are as formal and disinterested as John Doe and Richard Roe in ejectment.

They have no legal interest or right in the litigation such as belong to trustees in the sense of the law. They are but mere conducts through whom the suit is instituted in conformity to the local law. If the suit had been brought in New York, it must have been in the names of the Vermont corporation.

The court has often disregarded such parties on the question of jurisdiction, and looked to the real parties to the litigation.

If this suit had been brought in the circuit court in the name of the B. & R. R. R. Co., it would have been sustained; and so if brought by the Troy & B. Co. against it.

We think the cause properly removable.

113 (Indorsed:) Opinion. Nelson, C. J. Troy & Boston R. R. Co. ag't Shepherd Knapp and George Briggs. Circuit c't U. S., dist. of V't. Filed July 28, 1868. B. B. Smalley, clerk.

114 And upon the rendering of said decision the said Bennington County court order said cause to be removed to this court.

And it further appeared, on the present hearing, (at the July term, 1868,) that the said Shepherd Knapp and George Briggs were formerly trustees for the first-mortgage bond-holders of the Western Vermont Railroad, and that, prior to the commencement of this suit, said mortgage had been foreclosed, the equity of redemption had expired, and that the title to the railroad had become obsolete in the first-mortgage bond-holders; and that, under the laws of the State of Vermont, a new corporation called the Bennington and Rutland Railroad Company, had been organized by said bond-holders, and that all of said bonds, except some ten or twelve thousand dollars in amount, owned by resident citizens of the State of New York, had been converted by the owner thereof into the stock of said Bennington and Rutland Railroad Company; and that, by the laws of the State of Vermont, and the action of the courts thereunder, the said Bennington and Rutland Rail-
115 road Company was substituted trustee in the place and stead of

said Knapp and Briggs, of such bonds as had not been converted into stock of said Bennington and Rutland Railroad Company, and of the interest or claims of all other parties in said railroad, with all the powers and duties that said Knapp and Briggs formerly had.

And it further appeared that, after the foundation of said Bennington and Rutland Railroad Company, and its substitution as aforesaid, trustees, &c., the said company demanded of the Troy and Boston Railroad Company, the defendants, that the rent thereafter, according under the lease mentioned, should be paid to that company, to which the plaintiffs and defendants assented; and thereafter the rent was paid to said Bennington and Rutland Railroad Company. And at the termination of the lease the said Bennington and Rutland Railroad Company took, and have since continued in, the possession of the said railroad, and have the sole management thereof, without any claim or opposition on the part of Knapp and Briggs.

It further appeared that said Knapp and Briggs had no in-
116 terest, directly or indirectly, in the commencement or prosecution of this suit; that they had no control whatever over it; paid no part of the expenses of its prosecution; had employed no counsel; and that said suit was prosecuted solely by, and for the benefit of, said Bennington and Rutland Railroad Company, and at its expense; and that the said Bennington and Rutland Railroad Company had indemnified the said Knapp and Briggs against any liability growing out of said suit.

And that Knapp and Briggs did not know that said suit was to be brought until after the writ had been served.

And it further appeared that this suit was instituted in the name of the plaintiffs by the Bennington and Rutland Railroad Company, and prosecuted by said company at its own expense, and for its sole use and benefit, and that the plaintiffs were mere nominal parties to this action, having no right to control this suit, nor any interest in the matter in controversy, and have not in any way made any claim thereto, except to permit the Burlington and Rutland Railroad Company to prosecute this suit in their names, which they had no legal right to refuse.

117 It was admitted by both the plaintiffs and defendants that the said Bennington and Rutland Railroad Company was organized under the same laws of the State of Vermont; that said organization was valid and legal; and that thereby said Bennington and Rutland Railroad Company became the trustees of such bond-holders as had not converted their bonds into the stock of said Bennington and Rutland Railroad Company; and of the interests and claims of all other parties in said railroad.

And it was admitted by the plaintiffs that this suit was brought in their names because, as the plaintiffs claimed under the laws of the State of Vermont, and the rules of pleading then in force in that State, it was necessary so to commence the same in order to recover on said covenant, as no action upon a covenant can be maintained in that State in the name of any other person than the covenanter, unless where the covenant is, in terms, assignable, and runs with land, and has been duly assigned by the warrantee deed of the covenanter conveying the premises to which the covenant applies.

And thereupon the court held that the cause was properly re-
118 moved to this court; and therefore said motion to remand was denied.

And afterwards, at the Feb'y term, 1872, at the trial of the case upon the merits, the said facts were conceded by the plaintiffs.

And thereupon said cause was continued until the October term, A. D. 1868, of this court.

And at said October term, A. D. 1868, said cause was continued until the July term, A. D. 1869, of this court.

And at said July term, A. D. 1869 said cause was continued until the October term, A. D. 1869, of this court.

And at said October term, A. D. 1869, said cause was continued until the February term, A. D. 1870, of this court.

And at said February term, A. D. 1870, said cause was continued until the July term, A. D. 1870, of this court.

And at said July term, A. D. 1870, said cause was continued until the October term, A. D. 1870, of this court.

And at said October term, A. D. 1870, said cause was continued until the February term, A. D. 1871, of this court.

And at said February term, A. D. 1871, said cause was con-
119 tinued until the July term, A. D. 1871, of this court.

And at said July term, A. D. 1871, said cause was continued until the October term, A. D. 1871, of this court.

And at said October term, A. D. 1871, said cause was continued until the February term, A. D. 1872, of this court.

And at said February term, A. D. 1872, said cause came on for hearing before the Hon. David A. Smalley, district judge, and a jury, and the plaintiffs, upon the facts aforesaid, moved to remand said cause to the county court within and for said county of Bennington, but the court declined to received said motion on the ground that said motion had heretofore been twice heard and refused by this court.

And afterwards, at said February term, A. D. 1872, the plaintiffs filed a demurrer to the defendants' 5th plea, which demurrer was sustained by the court, and said 5th plea was adjudged insufficient.

And afterwards, at said February term, A. D. 1872, said cause was tried by a jury; and, after hearing the evidence, the arguments of counsel for the plaintiffs and defendants, and the charge of the court, which was not excepted to by either party, the jury rendered a verdict for the defendants.

120 And thereupon, on the 2d of April, A. D. 1872, judgement was rendered on the verdict for the defendant.

And afterwards, and on the first day of April, A. D. 1872, and during said February term, A. D. 1872, judgement on the verdict was rendered for the defendants.

And on the second day of April, A. D. 1872, and during said February term, 1872, the plaintiff prayed out a writ of error to the Supreme Court of the United States, and the same was duly allowed and filed, on said 2d day of April.

And on the said 2d day of April, 1872, the plaintiff presented a bond in the words and figures following:

121 Circuit court of the United States for the district of Vermont.

SHEPHERD KNAPP
vs.
THE TROY AND BOSTON RAILROAD CO.

Know all men by these presents that we, Shepherd Knapp, of the city, county, and State of New York, as principal, and C. E. Houghton, of Bennington, Vermont, as surety, are held and firmly bound unto the Troy and Boston Railroad Company, a corporation existing under the laws of the State of New York, in the sum of three thousand dollars, ($3,000,) to be paid to the said Troy and Boston Railroad Company, its successors and assigns; to which payment well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, *finally*, by these presents, sealed with our seals and dated this 2d day of April, A. D. 1872.

Whereas the above-named Shepherd Knapp hath prosecuted
122 his writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above-entitled suit by the circuit court of the second circuit of the United States within and for the Vermont district:

Now, therefore the condition of the above obligation is such that, if the above-named Shepherd Knapp shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

S. KNAPP. [L. S.]
C. E. HOUGHTON. [L. S.]

Sealed and delivered in presence of—
E. W. COX, as to S. Knapp.
S. D. HALL, as to C. E. Houghton.

APRIL 2D, '72.—Approved.

D. A. SMALLEY, *Judge.*

123 (Indorsed:) Shepherd Knapp v. The Troy and Boston Railroad Company. Bond. Filed April 2d, 1872. B. B. Smalley, clerk.

124 And the same was duly approved and ordered to be filed, and was filed.

And the same day a citation was duly issued out of this court, which citation is hereto annexed.

And on the 6th day of April, A. D. 1872, the said citation was returned to this court with an affidavit of service, as will appear by said original, hereto annexed.

125 UNITED STATES OF AMERICA, *ss:*

To the Troy & Boston Railroad Company, a corporation organized and existing under the laws of the State of New York, and having its residence and place of business at Troy, in the county of Rensselaer, and State of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first

Monday of December, 1872, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Vermont, wherein Shepherd Knapp, of the city of New York, is plaintiff, and you are defendant in error, to show cause, if any there
126 be, why the judgment in the said writ of error complained of should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 1st day of April, in the year of our Lord one thousand eight hundred and seventy-two.

D. A. SMALLEY,
Judge of the Circuit Court for the Dist. of Vt.

E. J. PHELPS,
Att'y for Pl'ff in Error.

127 U. S. Supreme Court.

SHEPHERD KNAPP, PL'FF IN ERROR.
vs.
THE TROY & BOSTON RAILROAD COMPANY, DEF' in error.

I, Thomas Failey, of Burlington, being duly sworn, depose and say that I am a United States deputy marshall for the district of Vermont.

That on the 3d day of April, 1872, at Bennington, in said district, I made service of the annexed citation in the above-entitled cause, by giving to Abram B. Gardner, esq., of said Bennington, the attorney of record for the defendant in error in said cause, a true and attested copy of said citation.

THOMAS FAILEY,
Deputy U. S. Marshal.

Fees, $15.00; paid by E. J. Phelps.

THOMAS FAILEY.

128 DISTRICT OF VERMONT,
Burlington, ss:

This 6th day of April, 1872, personally appeared the above-named Thomas Failey and made oath that the foregoing affidavit by him subscribed in my presence is true.

Before me—

B. B. SMALLEY,
Clerk United States Circuit Court, District of Vermont.

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130 (Indorsed:) U. S. Sup. Court. Shepherd Knapp, pl'ff in error, vs. The Troy & Boston Railroad Co., def't in error. Citation and affidavit of service. Returned, served April 6, 1872. B. B. Smalley, clerk.

(Indorsement on cover:) No. 286. Shepherd Knapp, plaintiff in error, vs. The Troy and Boston Railroad Company. Vermont C. C. U. S. Filed 27th November, 1872.

United States Supreme Court,

No. 286.

SHEPHERD KNAPP,

PLAINTIFF IN ERROR,

vs.

THE TROY & BOSTON RAIL ROAD COMPANY.

BRIEF FOR THE PLAINTIFF IN ERROR.

L. P. POLAND and
E. J. PHELPS,
Counsel.

Supreme Court of the United States,

No. 286.

Shepherd Knapp, Plaintiff in Error,

vs.

The Troy & Boston Rail Road Company.

In Error to the Circuit Court of the United States for the District of Vermont.

Brief for the Plaintiff in Error.

Statement.

This is an action of covenant broken, commenced by the plaintiff in error and George Briggs, since deceased, against the defendants in error, in the State Court of Vermont, to recover damages for the violation of various covenants in a lease of the Western Vermont Railroad, theretofore executed by the plaintiffs to the defendants. (*Record p.* 4.)

Both the plaintiffs were citizens of the State of New York, when the suit was brought. Said Knapp has ever since been and now is a citizen of that State. Said Briggs remained such citizen until his

decease. The defendant was also a citizen of the State of New York when the suit was brought, and ever since.

The defendants filed a motion in the State Court for the removal of the cause to the United States Circuit Court for trial, upon the alleged ground that the real party in interest on the side of the plaintiffs, was a Vermont Corporation. This motion was denied by the State Court. (*Record p.* 34.)

An application for a mandamus to compel the removal of the cause was then made by the defendants to the U. S. Circuit Court for Vermont. On hearing, that Court decided that the cause was removable under the statute. (*Record p.* 35.) And the State Court thereupon made the order of removal accordingly.

The plaintiffs thereupon filed a motion in the U. S. Circuit Court, that the cause be remanded to the State Court, and filed in support of the motion sundry additional affidavits. (*Record p.* 35.) This motion was denied.

The cause subsequently came on for trial, and the plaintiffs again renewed their motion that the cause be remanded to the State Court. This motion the Court refused to receive or hear. (*Record p.* 37.)

A trial and verdict for defendant was had, and the plaintiff brings error.

The facts affecting the question of the jurisdiction of the Federal Courts are substantially these.

Knapp & Briggs were originally the trustees of a mortgage upon the Western Vermont Railroad, executed to secure the bonds of the Western Vermont Railroad Company. By a foreclosure of that mortgage under the laws of Vermont, (where a strict foreclosure is allowed instead of a sale of the mortgaged premises,) the title of Knapp & Briggs to the railroad became absolute in fee in trust for the bondholders under the mortgage. They thereupon leased the railroad for a term of years to the defendants. A copy of the lease will be found on page 28 of the Record. And at the expiration of the term they brought this action upon the covenants of the lease.

In the meantime, and before the expiration of the lease, a new corporation, called the Bennington & Rutland Railroad Company, had been organized by a majority of the bondholders, in pursuance of

certain provisions in the General Statutes of Vermont. A copy of the Act, so far as material to the present discussion, is appended to this brief. In this organization, the bondholders who joined it had converted their bonds into stock. And it was claimed by the defendants in error that the new corporation was, by the provision of the Statute under which it was formed, substituted as trustee of the other bondholders, in place of the plaintiffs in error, and had thus become the real party in this suit.

But it further appeared that certain of the bondholders were citizens of New York, and had not joined the corporation, nor converted their bonds, nor assented to the corporation becoming their trustee; and that the accounts of the original trustees had not been settled, nor they discharged from their trust, unless by the legal effect of the organization of the new corporation.

And it was claimed by the plaintiffs, that the Statute of Vermont did not make the new corporation trustee of past causes of action accrued to the bondholders, but only of the railroad and its future management. And could not constitutionally make such corporation trustee at all, for such bondholders as did not choose to join it or to convert their lands into its stock.

That the citizenship of the parties of record in the cause must determine the question of jurisdiction. But if that of the real parties in interest was to be regarded, some of these parties in interest were likewise citizens of the same State with both the parties of record.

Assignment of Errors.

The plaintiff in error assigns, and will rely upon as errors shown upon the record in this case:—

1. The decision of the Circuit Court that this cause was properly removable under the Acts of Congress, from the State Court of Vermont, where it was pending, to the Circuit Court of the United States for trial.

2. The refusal of said Circuit Court to grant the motion filed by the plaintiff in error to remand this cause to the State Court for trial.

3. The refusal of said Circuit Court to receive or hear the second motion offered by the plaintiff in error, to remand this cause to said State Court.

4. The assumption of jurisdiction of this cause by said Circuit Court, and the rendition of a judgment therein for the defendants in error. This cause not being within the proper jurisdiction of said Circuit Court to entertain, try, or determine. And said judgment being void for want of jurisdiction in said Circuit Court.

Points for the Plaintiff in Error.

I. Upon the facts appearing in the record, and irrespective of what is shown relative to the residence of the *cestuis que trust*, it is insisted that this case is not within the jurisdiction of the Federal Court.

Even in a suit in equity, and much more in an action at law, the jurisdiction of those Courts, so far as dependent upon citizenship, will be determined by that of *the parties to the record.*

And the Court will not enquire, on either side, into the residence of those who are not parties, but who may have an equitable interest in the result of the suit.

Thus in *Chappedelaine et al. vs. Dechenaux, Ex'r*, &c., 4 *Cranch* 306, (2 *Pet. Cond.* 116,) it was held that the plaintiffs, being aliens, though executors and mere nominal parties representing citizens of Georgia, might sue other citizens of Georgia in the the U. S. Courts.

And the same point was again decided in *Childress vs. Emery*, 8 *Wheaton*, 642. (5 *Pet. Cond.* 547.)

Nor has the application of this rule been confined to the case of executors.

In *Osborn vs. The Bank of the United States*, 9 *Wheaton*, 758, (5 *Pet. Cond.* 741,) the plaintiff in error was State Auditor of Ohio, and the suit was brought by the Bank to restrain the collection of an unconstitutional tax. It was claimed that the State Auditor was a mere representative party, having no personal interest in the suit. And that as the real party in interest was the State of Ohio, who

could not be sued in the Federal Court by a citizen of another State, the jurisdiction of that Court did not attach. The point received much consideration, and it was held that the jurisdiction was determined by the actual parties to the record, without reference to those not on the record who might be beneficially interested.

Ch. Jus. MARSHALL in delivering the opinion says: "The judicial "power of the Union is also extended to controversies between citi- "zens of different States; and it has been decided that the character "of the parties must be shown on the record. Does this provision "depend on the character of those whose interest is litigated, or of "those who are parties on the record? In a suit, for example, "brought by or against an executor, the creditors or legatees of his "testator are the persons really concerned in interest; but it has "never been suspected that if the executor be a resident of another "State, the jurisdiction of the Federal Courts could be ousted, by "the fact that the creditors or legatees were citizens of the same State "with the opposite party. The universally received construction in "the case is, that jurisdiction is neither given nor ousted by the "relative situation of the parties named on the record. Why is this "construction universal? No case can be imagined, in which the "existence of an interest out of the party on the record, is more unequi- "vocal, than in that which has just been stated. Why then is it "universally admitted, that this interest in no manner affects the "jurisdiction of the Court? The plain and obvious answer is, "because the jurisdiction of the Court depends, not upon this "interest, but upon the actual party to the record. * * * * "This principle might be further illustrated, by showing that the "jurisdiction, where it depends on the character of a party, is never "conferred in consequence of the existence of an interest in a party "not named. * * * But the principle seems too well estab- "lished to require that more time should be devoted to it. *It may, "we think, be laid down as a rule that admits of no exception, that "in all cases where jurisdiction depends on the party, it is the party "named in the record.*"

In the case of *Gov. of Georgia vs. Machazo*, 1 *Pet.* 122, the subject

came up again before the Court, and with the same result. The language above quoted in italics was repeated and re-affirmed in the opinion of Ch. J. MARSHALL.

The case of *Irvine v. Lowry*, 14 *Pet.*, 293, is directly in point.

It was an action on a non-negotiable note, brought by a citizen of Pennsylvania "for the use of the Lumbermen's Bank" of that State, against a citizen of New York. The note was the property of the Bank, some of whose shareholders resided in the same State with the defendant. It was at that time the rule, that a corporation was not regarded as a citizen of a State, unless all its members resided there. The defendant removed the case to the Federal Court, where a motion was made by the plaintiff to dismiss it. The Court held that if the Bank were regarded as the plaintiff, the objection to the jurisdiction must prevail. But that the legal right of action being in the plaintiff of record, that sustained the jurisdiction. They say, "as "the endorsement passes only an equity the legal interest is in him; "he is the real plaintiff in a Court of law, in which legal rights alone "can be recognized."

In *Bonfantee v. Williams*, 3 *Howard*, 374, which presented the same question, and was an action on promissory notes made payable to plaintiff for the use of others, Justice McLEAN in delivering the opinion says: "Where the citizenship of the party gives jurisdiction, "and the legal right to sue is in the plaintiff, the Court will not "enquire into the residence of those who may have an equitable "interest in the claim. They are not necessary parties on the record. "A person having the legal right may sue in the Federal Courts, "without reference to the citizenship of those who may have the "equitable interest."

So rigidly has the rule been adhered to, that the jurisdiction, where dependent on citizenship, must appear on the record, that in numerous cases suits have been dismissed, which were actually within the jurisdiction of the United States Courts, for want of a full and explicit averment on the record of the citizenship required.

Bingham vs. Cabot, 3 *Dallas*, 382.
Emery vs. Greenough, *ib.* 369.

Turner vs. Bank of North America, 4 *Dallas*, 7.
Mossman vs. Higginson, *ib.* 12.
Abercrombie vs. Dupin, 1 *Cranch*, 343.
Wood vs. Wayman, 2 *Cranch*. 9.
Capron vs. Van Norden, 2 *Cranch*, 126.
Martelet vs. Murray, 4 *Cranch*, 46.
Hodgson et al. vs. Bowerbank, 5 *Cranch*, 303.
Sullivan vs. Fulton Steamboat Co., 6 *Wheaton*, 450.

It is believed that the only case that gives any apparent countenance to the proposition that the jurisdiction will depend upon the residence of the plaintiff in interest, rather than on that of the plaintiff of record, is *Brown vs. Strode*, 3 *Cranch*, 303.

That was an action on an executor's bond taken under a statute of Virginia, to the justices of the county, for the benefit of the heirs.

But in that case the record itself disclosed the real party, by whom and for whose benefit the suit was brought. And the Court took judicial notice of the statute provision.

And in Irvine vs. Lowry above cited, the Court comment on this case and point out the true line of distinction.

The case therefore furnishes no authority for going behind the record to ascertain the parties in interest, in order to determine the jurisdiction. If it did, it would be plainly overruled by the subsequent decisions.

The more recent decisions of the court are to the same effect as the former ones.

The case of *Coal Company v. Blatchford*, 11 *Wallace* 172, presented the identical question now under discussion. That suit was brought by a trustee having no interest, in behalf of *cestuis que trust*, who were the real parties, and the jurisdiction was held to depend on the citizenship of the parties.

After stating the general rule, that where the jurisdiction depends upon citizenship, all the plaintiffs must be competent to sue, and all the defendants liable to be sued in the Federal Courts, or the jurisdiction will not be entertained. The court say:

"Executors and trustees suing for others benefit form no exception to this rule. If they are personally qualified by their citizenship to

bring suit in the Courts of the United States, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified; and if they are not personally qualified by their citizenship, the Courts of the United States will not entertain jurisdiction, though the parties they represent may be disqualified."

And it is to be observed, that this case was a bill in equity, where the record on its face disclosed that the plaintiff was only a trustee; and where it would be much more reasonable to go behind the record to ascertain the real parties, than in a special action at law.

In the subsequent case of *Davis v. Gray*, 16 *Wallace* 220, where it was claimed that making a State Officer a party to a suit, was in effect making the State a party, inasmuch as the officer had no personal interest, and only represented the state in his official capacity, the court held otherwise, and after referring with approbation to the case of *Osborne v. Bank of the United States*, above referred to, say:

"*In deciding who are parties to the suit, the Court will not look beyond the record.* Making a State Officer a party does not make the State a party, although her laws may have prompted his action, and the State may stand behind him as the real party in interest."

Nor is this question at all affected by any thing contained in the Act of 1867, under which the removal of the case was made. That act extends the provisions of the act of 1789 on the subject, in two important particulars. It gives the right of removal to the plaintiff as well as to the defendant, and allows it to take place at any time before final judgment, if the prescribed affidavit is filed. But it has never been claimed that it changed the settled rule that determines who are to be regarded as the plaintiff and the defendant.

There is nothing whatever in the language of the act, the reason on which it is founded, or the object in view, to indicate any such intention. On the contrary, the words of the act seem studiously to adhere to the old rule on this point. The right of removal is given to the non-resident party, "whether he be *plaintiff or defendant*," and there is no word in the act that points toward an extension of this right to parties in interest, not plaintiffs or defendants.

Of course, in view of the long established rule on this subject, if it had been the intention of Congress to change it, that intention would have been sufficiently expressed.

That rule does not stand. and was never ascribed to, any particular words in the act of 1789. But on those plain and insurmountable reasons set forth in the decisions, and the practical impossibility of any other rule. These reasons apply with equal force to the act of 1867, as to that of 1869.

If such a criterion of jurisdiction were allowed to prevail as is now contended for by the defendants in error, the whole subject would be involved in uncertainty and confusion.

The record would afford no aid in determining whether parties not named have an equitable i terest in the controversy. That fact, liable to the greatest dispute, must be found upon parol evidence outside of the record.

By what proceedings are the Court to determine such an issue? And as remarked by the Ch. Justice in *Osborne v. The Bank of the United States*, how can they enter upon the trial of it at all, without first assuming the very jurisdiction in question?

If found one way by the State Court, on an application to remove, is that finding to be held conclusive. or not, by the Federal Court, on a discussion of the question here?

Nor would the enquiry be limited to the equitable interests on the side of the plaintiff alone, nor to facts tending to enlarge the jurisdiction merely. If such an interest is available on one side, it must be equally so on the other. If it is sufficient to confer a jurisdiction not shewn by the record, it must be likewise effectual to take away a jurisdiction which on the face of the record exists.

And it would be in the power of parties, to an unlimited extent, to confer or defeat jurisdiction, by transfers of equitable interests. which could never be proved to have been intended for that purpose,

It was this facility for transfer in the case of negotiable paper, that

caused the adoption of the statute, restricting the jurisdiction of the Federal Courts to cases where it would have attached irrespective of the transfer.

If it had been supposed that the transfer of equitable rights in non-negotiable contracts would affect the jurisdiction in actions to nforce them, doubtless the statute provision would have been extended accordingly.

The pertinency of these decisions and observations will be perceived, when it is remembered that the interests of the equitable parties, through whom it is now sought to establish the jurisdiction of this Court in the present case, was exclusively derived through the purchase and transfer of obligations originally negotiable, and constantly changing from hand to hand, as well after as before the foreclosure.

II. But even if the residence of the equitable parties were allowed to determine the question, the facts disclosed in the affidavits filed by the plaintiffs, exclude the jurisdiction of the Federal Court.

It appears that a considerable amount of the bonds were held at the time of the commencement of the suit, and a part are still held, by citizens of New York.

Record pp. 31, 32, 35.

It has been decided that the question of jurisdiction must be determined upon the facts existing when the suit is commenced.

Conally vs. Taylor, 2 *Pet.* 564.

It is proposed, then, to remove to the Federal Court a case where the plaintiffs, the defendants, and a part of those for whose benefit the suit is brought, are all residents of the same State.

Were these parties in interest also the parties of record, it is well settled that the objection of the residence of a part of them in the same State with the defendants, would be fatal to the jurisdiction.

Strawbridge vs. Curtis, 3 *Cranch*, 267.

Blatchford vs. Coal Co., supra.

Most clearly they cannot stand in any better position, as affecting this question, than if they were parties of record. If they are to be

regarded as parties, the rule that applies to parties must apply to them.

III. The provision of the General Railroad Law of Vermont, that the corporation organized by the bondholders shall be trustee for interests not embraced in the corporation, has no application to this case.

1. It has reference only to the custody and possession of the railroad by the new corporation, after they shall have assumed the occupation of it, and not to rights of action previously accrued to the trustees of the mortgage, under pre-existing contracts. And stands, not upon any intention of the Legislature to interfere unnecessarily with private property, but upon the right of the State to exercise such control over the management of these public works, as the public good requires.

The scope of the act therefore terminates, where its reason and its object are answered.

2. If this statute were to receive such a construction as would result in substituting, against the will of the bondholders under the mortgage, a new corporation trustee created by the Legislature, in place of the individual trustees provided in the mortgage, it would be plainly unconstitutional, as impairing an important obligation of the contract.

By the mortgage the title was conveyed to trustees therein named, for the benefit of purchasers of the bonds, and those trustees were invested with the active and important function of managing the trust.

By the foreclosure of the mortgage this title became absolute. And (as decided by the Supreme Court of Vermont in regard to this very trust,) the active duties of the trustees were thereby not only continued, but enlarged.

Sturges & Douglas vs. Knapp & Briggs, 31 *Vt.* 1.

It is too plain to require argument, that it was not afterwards in the power of the State Legislature, without the consent of the *cestuis que trust*, to divest the trustees of their title to the property and their function, and especially of rights of action accrued and vested, and to confer them upon another party, not known in the contract under which they were derived.

No such construction has ever before been claimed for this statute. And the Supreme Court of Vermont have held an act which authorized the bondholders under a railroad mortgage to elect trustees in place of those named in the instrument to be in violation of the constitution.

Fletcher vs. R. & B. R. R. Co., 39 *Vt.*, 633.

It is to be further observed upon this point, that the accounts of Messrs. Knapp & Briggs, as trustees, had never been settled, nor they discharged from their trust. That the bondholders in New York who had not joined the new corporation, or converted their bonds into its stock, had never in any way discharged the trustees from their obligation. And that the trustees would have a clear lien upon the recovery in this case, to the extent of the interest of these bondholders, as well as for their own compensation and disbursements.

3. But conceding for the purposes of the argument, the utmost that can be claimed as the effect of the Vermont Statute, and assuming that the new corporation did thereby become fully substituted for the former trustees, as trustee of the very right of action now in question, for the benefit of these New York bondholders as well as of those who had converted their bonds into stock:

The corporation is still, so far as those parties are concerned, only a trustee, and not the real party in interest. And if, upon the argument of the defendant in error, the citizenship of the real party and not of the trustee must control the jurisdiction, upon what ground is it made out that the new or substituted trustee, not a party to the record, is any more the real party in interest than the original trustee, to whom the cause of action accrued, and who is a party to the record?

The Statute itself, which is relied on as making the corporation a trustee for bondholders who have not joined it, declares that as such the corporation shall hold "*as tenants in common*," with the other bondholders, and not independently.

See Statute, Sec. 108, *p.* 16 *of this brief.*

Whether, therefore, the Bennington & Rutland Railroad Company did or did not become the successor of Knapp & Briggs as trustee for those bondholders residing in New York, it still remains, that the plaintiffs of record, a part of the plaintiffs in actual interest, and the defendants of record and in interest, were all citizens of the same State when this suit was brought, and ever since.

And this being true, it is respectfully submitted that there can be no pretence whatever for supporting the jurisdiction of the Federal Courts in the case.

E. J. PHELPS,

Of Counsel for the Plaintiff in Error.

Extracts from General Statutes of Vermont, Chap. 28.

SECT. 104. In all cases where a mortgage of any railroad or any part thereof, made by any railroad company in this state, to secure the payment of bonds, shall have been foreclosed, and the legal title to the mortgaged premises vested in the mortgagees, any number of persons holding a majority in amount of the principal of the bonds so secured, may form themselves into a corporation for the purpose of owning or maintaining and operating such railroad, or part thereof, for public use, in the conveyance of persons and property, in the manner following: they may make, subscribe, and file articles of association, in which shall be set forth a brief statement of the making and foreclosure of the mortgage under which they have become interested in such railroad; the amount of bonds which were owing upon and secured by the mortgage; the name of the corporation to be formed; the amount of its capital stock, which shall not exceed the amount of principal and interest of said bonds, and twenty-five per cent on the same in addition thereto, and the number of shares, each of which shall be fifty dollars, into which the capital stock shall be divided; the number of directors by whom the corporation shall be managed; the names of the persons who shall be directors for the first year, and until others are chosen in their places, and a majority of the directors of such corporation shall be residents of this state. Each subscriber to such articles shall state in his subscription the number of shares which he takes or agrees to take, and the amount of bonds held by him and secured by such mortgage which he intends to surrender in payment or part-payment of his subscription; such subscription may be made by the holder in person, or by his attorney or agent, and any three of the persons named in said articles as directors may be inspectors of such subscriptions, and the production of any such bonds shall be evidence of the right of the person holding the same to subscribe to said articles.

SECT. 105. Such articles of association shall be filed in the office of the secretary of state, and a copy thereof filed and recorded in the offices of the clerks of each of the counties through which the said railroad shall pass; and a notice of the formation of such corporation, and of the filing of the articles, shall be published once a week for three successive weeks in a newspaper published in each of said counties, if any be published therein, and for six successive days in two or more dailies published in each of the cities of New York and Boston; but such articles shall not be so filed until the amount of bonds, to be surrendered by the subscribers thereto for that purpose, shall be at least a majority in amount of the principal of the bonds secured by the mortgage referred to in such articles; nor until there is indorsed thereon, or annexed thereto, an affidavit made by at least three of the directors named in said articles, that they have in good faith examined the list of such subscribers, and that they believe the said subscribers to be the holders or representatives of the amount of bonds therein stated, and that they believe the said subscribers intend, in good faith, to comply with the terms of their subscription.

SECT. 106. Any holder of a bond or bonds secured by such mortgage may, within thirty days after the last publication of the notices provided for in the preceding section of this chapter, either in person or by attorney or agent, subscribe the articles of association, or a copy thereof, for any amount of stock equal to the amount of bonds held by him or them, which he or they intend to surrender to the directors of said new company, in payment or part-payment of his or their subscription; but no subscription shall be made for a fractional part of a share; and when a holder of bonds would otherwise be entitled to subscribe for a fractional part of a share, he may subscribe for a full share and pay the excess in cash.

SECT. 107. In case any holder or holders of bonds, secured by the mortgage referred to in such articles of association, decline or neglect to subscribe said articles and to become stockholders in the company formed, the court of chancery may, upon the application of such holder, by a decree direct the estate, title, and interest of such holder or holders to be assigned to said company, and such company

shall pay such sum of money, at such times and in such manner, to the other party or parties, as the commissioners appointed by the court shall judge just and equitable; and if said holder or holders shall not be satisfied with such appraisal as aforesaid, the court shall order the commissioners to sell such estate at public or private sale, agreeably to the order of the court, and execute a good and sufficient conveyance to the purchaser thereof, as provided in the chapter relating to the partition of real estate.

SECT. 108. Every company formed under the provisions of this chapter, shall, from the time its articles of association are filed as aforesaid, be a corporation, vested with all the powers, rights, privileges, and franchises for maintaining and operating its railroad, which were vested in and enjoyed by the corporation mortgaging it, and it shall be subject to like duties and liabilities, and shall be subject to the future legislation of this state; and it may at once take possession of and maintain and operate said railroad, subject to all existing rights of other parties, and may proceed in any manner it may deem expedient, either by purchase or otherwise, to obtain the title and ownership, or the use and benefit of the whole estate, and to satisfy the undivided interests or claims of any other party or parties interested in said railroad; and until the interests of such parties shall become vested in such new corporation, said corporation shall be the trustees thereof, and shall be accountable therefor as tenants in common.

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Supreme Court of the United States.

SHEPARD KNAPP,
Plaintiff in Error,

vs.

THE TROY & BOSTON R. R. CO.,
Defendant in Error.

Points for Defendant in Error.

This Action was originally brought in the County Court within and for the County of Bennington in the State and District of Vermont, by Attachment tested January 16, 1867. (Record, fols. 15–47.) It was for breach of covenants contained in a Lease of the Western Vermont Railroad executed January 16, 1857, by which Plaintiffs, as Trustees, demised the Road to Defendant, for the term of ten years. (Record, fols. 15, 78.)

At the July Term 1858 of the Circuit Court for the Second Circuit held at Windsor, Vermont, before *Justices Nelson & Smalley*, the Defendant submitted certified copies of its Petition and papers annexed, theretofore presented to the said County Court, praying the removal of the Cause to the said Circuit

Court. (Record, fol. 5.) The Petition averred, that the Defendant was a Railroad Corporation created and existing under the Laws of the State of New York, and was a Citizen of that State ;—that the process by which the Suit was commenced, was sued out by The Bennington and Rutland R. R. Co., a Corporation created and existing under the Laws of the State of Vermont, in the name of the Plaintiffs in the Record, who were residents of the City of New York ;—that the matter in dispute exceeded the sum of five hundred dollars ;—that the Plaintiffs were but nominal parties having no interest in its subject matter or result. (Record, fol. 6.) The Affidavit attached, among other things averred that The Troy & Boston R. R. Co. would not be able to obtain justice, or an impartial trial in said County Court. (Record, fol. 10.) The Order of that Court accepting the security offered, and removing the Cause to the Circuit Court was presented. (Record, fol. 13.) The Cause was thereupon Ordered upon the Docket of the Circuit Court. (Record, fol. 91.)

Afterward Counsel for Plaintiffs filed a Motion to remand the Cause to the County Court. (Record, fol. 91.) Upon that motion it appeared, that the Bennington Court having refused the Order of removal, the Parties stipulated, that Defendant should move in the Circuit Court for a Mandamus directing the removal ;—that the Motion should be heard before *Justice Nelson*, and if he was of opinion that the Cause was a proper one to be removed, then an Order was to be entered by consent removing it ;—that *Justice Nelson* held that the cause was properly removable and the Order for removal was entered. (Record, fol. 110.)

It further appeared, that the Plaintiffs were Mortgage Trustees ;—that prior to the commencement of this Suit, the Mortgage had been foreclosed, and title

absolute vested in the Bond-holders;—that the latter had organized the Bennington & Rutland R. R. Co.;—that the Bonds were converted into Stocks with the exception of $10,000 or $12,000 held by Citizens of New York;—and that by the Laws of the State of Vermont and the action of the Courts thereunder, The Bennington & Rutland R. R. Co. had been substituted as Trustee in place of the Plaintiffs, of such Bonds as had not been converted into Stock, and of all parties interested—(Record, fol. 114);—that by the assent of the Parties rent accruing under the Lease mentioned in the Pleadings, was paid to the Bennington & Rutland Railroad Company, and at the termination of the Lease, it took possession of the demised property, (Record, fol. 115);—that the Plaintiffs had no interest directly or indirectly in the commencement or prosecution of this Suit;—that they had no control whatever over it, paid none of the expense, employed no Counsel;—but that it was prosecuted solely by and for the benefit of the Bennington & Rutland R. R. Company who had indemnified Plaintiffs against any liability growing out of the Suit, which had been brought without their knowledge. (Record, fol. 116.) And it was conceded that it was brought in their names because the Laws of Vermont did not permit an Action upon the Covenant counted upon in any other name. (Record, fol. 117.)

The Circuit Court thereupon held, that the Cause was properly removed and denied the Motion to remand. (Record, fol. 118.) Trial was had before a Jury at the February Term 1872. Defendant obtained a Verdict, on which Judgment was entered April 2, 1872. (Record, fol. 119.)

The only point presented by the Record, arises upon the proceedings removing the Cause to the Circuit Court. Plaintiffs are supposed to insist, that the Cause was not removable for two reasons:—

First—Because the Parties to the Suit were residents of the same State: *Second*—Because a portion of the Bond-holders resided in the same State with the Defendant.

I. The removal of this Cause was claimed under the Act of Congress approved March 2, 1867, (U. S. Statutes at large, V. 14, p. 558,) amending the Act approved July 27, 1866. (id. p. 306.) The material portion of the Act of 1867 is as follows: "*That where a Suit is now pending, or may hereafter be brought in any State Court, in which there is a controversy between a Citizen of the State in which the Suit is brought and a Citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such Citizen of another State, whether he be Plaintiff or Defendant, if he will make and file, in such State Court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State Court, may, at any time before the final hearing or trial of the Suit, file a Petition in such State Court for the removal of the Suit into the next Circuit Court of the United States to be held in the District where the Suit is pending,*" &c.

II. It is conceded that the Plaintiffs were purely nominal Parties, having no interest in the subject of the litigation, which was commenced without their knowledge, and prosecuted without their participation. Before the Action was commenced, their title as Trustees had terminated. The Bennington & Rutland Railroad Company, who were movers of the

Suit, had become Trustee under the Laws of Vermont, and in obedience to those Laws, used the names of the Plaintiffs, indemnifying them from all liability growing out of the litigation. (Record, fol. 114.)

Whatever may be the rule, as regards Trustee Parties holding the legal title to the subject of litigation, both reason and authority require the Court, in a Case like this, to look beyond the nominal Party, to the person by whom, and for whose interest he is used. The object leading to this jurisdiction conferred upon the United States Courts, was to secure an impartial tribunal in contests between Citizens and interests of different States. In determining Citizenship and interest, the Court will regard the legal title to the subject matter. Hence Executors and Trustees, vested with the legal right and in Law entitled to the results of the Suit, are regarded as real Parties to a litigation, in which they represent their trust.

Coal Company v. *Blatchford*, 11 Wal., 172.

The policy creating this jurisdiction would be frustrated if the actual Parties in interest could contest in the names of nominal representatives. Trial could be forced where prejudice and influence would overcome justice. The present Case is an instructive illustration of the mischief that practice would produce. The Defendant is a Corporation foreign to Vermont. The real Plaintiff is a Corporation of the County of Bennington, where the Suit was originally instituted. Mr. *Turner W. Parks*, its principal owner and manager of the Suit, resides in that County. (Record, fols. 102, 110.) And it is contended, that because the Laws of Vermont require the Action to be brought in the name of a New York Plaintiff, wholly disconnected with its subject,

and indifferent to its result, the Defendant must submit its rights to the judgment of a local and partial tribunal. If such be the practice, it is a serious misfortune. Certainly it is not made necessary by any just construction of the Acts of Congress. An interpretation of them seeking to promote their intention would lead to a different conclusion.

This Court, it is believed, has not sanctioned this doctrine. Its decisions are quite otherwise.

Browne v. *Strode*,	5 Cranch, 303.
Wormley v. *Wormley*,	8 Whea., 421.
McNutt v. *Bland*,	2 How., 1.
Wood v. *Davis*,	18 id., 467.

In *Browne* v. *Strode*, the Suit was brought by Justices of the Peace of a County in Virginia, upon an Executor's Bond, to recover a debt due from the Testator to a British subject. Both Plaintiffs and Defendant were Citizens of Virginia. The Case was certified to this Court from the Circuit for the District of Virginia, the Judges being divided in opinion upon the question of jurisdiction. This Court held, that Plaintiffs were but nominal Parties, that the real Plaintiff in interest was an Alien and the Court below possessed of jurisdiction.

McNutt v. *Bland*, was of like character. The Suit was by the Governor of Mississippi upon a Sheriff's Bond, for an escape. It was brought in the Circuit Court by the Plaintiffs in the Execution, Citizens of New York, in the name of the Governor, to whom the Bond run by the Laws of Mississippi. Although the Plaintiff and Defendant were residents of that State, the Suit was held by this Court well brought, the Governor being "a purely naked Trustee."

These Cases are identical in principle with the present. These Plaintiffs were made Parties because of a Law of Vermont, which prevailed neither in the Circuit Court, or the Courts of New York. They were equally formal Parties with the Justices in the one Case, and the Governor in the other. They were mere instruments employed by the beneficiary in submission to a local Law of practice.

The distinction sought to be presented, between mere nominal Parties, and representative Parties clothed with a legal title, is recognized by *Justice Davis* in *Rice* v. *Houston*, (13 Wal. 66.) He says: "*Although in controversies between citizens of different States, it is the character of the real and not that of the nominal Parties to the Record which determines the question of jurisdiction, yet it has been repeatedly held by this Court, that Suits can be maintained in the Circuit Court by Executors or Administrators, if they are Citizens of a different State from the Party sued, on the ground that they are the real Parties in interest, and succeed to all the rights of the Testator or intestate by operation of Law.*"

The decision in *Coal Company* v. *Blatchford*, (11 Wal. 172,) is not at all adverse to the Defendant. *Blatchford* and *Newman*, as Mortgage Trustees, filed their Bill for foreclosure, for the sole benefit of an Alien and a Citizen of New Jersey. *Blatchford* was a Citizen of Pennsylvania, *Newman* and the Defendant Corporation were Citizens of New York. This Court held, that the question of jurisdiction depended upon the Citizenship of the Trustees and not of the Parties for whose benefit the Suit was brought, and ordered Bill dismissed because *Newman*, one of the Plaintiffs, was not competent to sue. The facts present no analogy to the Case at Bar. There the

Plaintiffs were active Trustees, vested with the legal title, and alone competent to assert the trust interest. Here the Trusteeship of Plaintiffs had ceased;—the actual Trustee was using their names by virtue of his legal right, they being involuntary Parties, and having no legal right to withhold their names, (Record, fol. 116,) which were used from necessity under the Laws of Vermont. (Record, fol. 117.)

III. The objection that a portion of the Bondholders interested in the Trust, were residents of New York, is not well taken. Had the actual Trustee, The Bennington & Rutland R. R. Co., been Plaintiff, the jurisdiction of the Circuit Court would have attached, notwithstanding his *cestui que trusts* had been Citizens of Vermont. The question depends altogether upon the Citizenship of the Bennington & Rutland R. R. Co., it being the actual Trustee, the legal right to sue on behalf of the Bondholders being in it.

Bonnafer v. *Williams*,	3 How., 574.
Hatch v. *Chicago R. R.*, and cases cited at p. 112.	6 Blatch., 105.
Coal Co. v. *Blatchford*,	11 Wal., 172.
Rice v. *Houston*,	13 id., 66.

IV. Plaintiff is not at liberty to question the validity of the Laws of Vermont, or the regularity of the proceedings, by which The Bennington & Rutland R. R. Co. was substituted as Trustee. The fact is conceded. (Record, fol. 118.) The mode of accomplishing it, is not stated, nor was it necessary that it should be. It may have been done by Legis-

lative Act:—Or by consent:—Or by the removal of the original Trustees by the Courts for incompetency or fraud. The fact being conceded, in the absence of proof, it will be presumed lawful.

The Railway Act of Vermont, authorizes the majority of Bond-holders purchasing under a foreclosure, to form a new corporation to own, maintain, and operate a purchased Railroad. (Laws 1862, Chap. 28, § 104.) It vests the Company thus formed with all the powers, privileges and franchises of the original Corporation, and empowers it "*to proceed in any manner it may deem expedient, either by purchase or otherwise, to obtain the title and ownership, or the use and benefit of the whole estate, and to satisfy the undivided interest or claims of any other Party or Parties interested in said Railroad; and until the interests of such other Parties shall become vested in such new Corporation, such Corporation shall be the Trustees thereof, and shall be accountable therefor as tenants in common.* (id. § 108.)

By an Act passed November 18, 1864, the Corporation formed under the foregoing provisions was declared entitled to receive rents accruing under Leases executed by the Trustees of the Mortgagees who foreclosed.

It being found by the Record, (fol. 114,) that The Bennington & Rutland R. R. Co. had become Trustee in the place of the Plaintiffs, and conceded by Plaintiffs, (Record, fol. 118,) the regularity of the substitution will be assumed, and if necessary, that the outstanding interests of the few Bond-holders who had not converted the Bonds, had before this Suit been purchased by the new Corporation and Trustee as it was authorized.

It is not, however, necessary to rely upon these Statutes to sustain the substitution. Plaintiffs, by the Record, not only admit the fact, but in terms concede "*that the Plaintiffs were mere nominal Parties to this Action, having no right to control this Suit, nor any interest in the matter in controversy.*" (Record, fols. 116, 118.) And the substitution might have been effected under the general Laws of Vermont, without the aid of these Statutes.

V. The Act of March 2, 1867, seems designed to remove whatever difficulties upon this point of jurisdiction, may have grown out of the presence of formal or nominal Parties on the Record. Its phraseology is unusual. Former Statutes on the subject rested the question upon the Parties to the Suit. This makes it to depend upon the Parties to the controversy. The word controversy is not used as a synonym with Suit or Action, but as indicative of the actual contestants. This construction is not artificial or strained. It serves to advance the purpose of this and other Acts *in pari materia.* It especially promotes the declared design of the Act of 1867, by removing a Cause beyond the prejudices and influences attaching to the real litigants. Recognized rules of statutory interpretation favor a rendition thus harmonizing with the language used, and securing an avowed object. "A thing within the intention, is within the Statute, though not within the letter." It is the avowed purpose of the Act of 1867 to secure a Trial, liberated from prejudice and local influence. Obviously this cannot be secured if nominal Parties can control the selection of the forum, leaving the opportunity to those in interest, who alone would subsidize improper instruments, to employ them effectually.

This construction is made necessary by the terms

of the Acts of 1866 and 1867. The latter is an Amendment of the former. It is not especially perspicuous, failing to declare whether it is a substitute for, or an addition to that of 1866. The different and distinct contingencies contemplated by each require the last to be considered as merely supplemental. The first confers jurisdiction in case of several Defendants, one of whom is a Citizen of the same State as the Plaintiff, if it appear either that the Suit is brought to enjoin the Defendant Citizen of a State other than that in which the Suit is brought, or that there can be a final determination of the controversy, so far as concerns him, without the presence of the other Parties. (14 Stat. at large, 306.) The Act of 1867 is an enlargement of the principle. Both regard the Parties to the controversy as the test of jurisdiction. The first considers them when they are actual Parties. The last when they are not, but are represented on the Record by nominal Parties. Both look to the same policy, and without the last, the first would be ineffectual to reach its full application.

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